

18 No. 98-436-CSX Title: John H. Alden, et al., Petitioners
v.
Maine

Docketed: Court: Supreme Judicial Court of Maine
September 14, 1998

Entry Date Proceedings and Orders

Sep 14 1998 Petition for writ of certiorari filed. (Response due October 14, 1998)
Oct 9 1998 Brief of respondent Maine in opposition filed.
Oct 19 1998 Reply brief of petitioners John H. Alden, et al. filed.
Oct 21 1998 DISTRIBUTED. November 6, 1998
Oct 27 1998 Supplemental brief of petitioners John Alden, et al. filed.
Nov 9 1998 Petition GRANTED.
SET FOR ARGUMENT March 31, 1999.

Nov 24 1998 Record filed.
Dec 8 1998 Motion of the United States for leave to intervene filed.
Dec 14 1998 Motion of the United States for leave to intervene GRANTED.
Dec 16 1998 Order extending time to filed United States' brief on the merits until January 7, 1999.
Dec 17 1998 Order extending time to file brief of petitioner on the merits until January 7, 1999.
Jan 6 1999 Brief amicus curiae of National Association of Police Organizations filed.
Jan 7 1999 Joint appendix filed.
Jan 7 1999 Brief of petitioners John Alden, et al. filed.
Jan 7 1999 Brief amici curiae of Association of American Publishers, Inc., et al. filed.
Jan 7 1999 Brief of United States filed.
Feb 1 1999 Order extending time to file brief of respondent on the merits until February 12, 1999.
Feb 4 1999 Brief amicus curiae of Pacific Legal Foundation filed.
Feb 8 1999 Brief amicus curiae of Home School Legal Defense Association filed.
Feb 11 1999 CIRCULATED.
Feb 11 1999 Brief of respondent Maine filed.
Feb 12 1999 Brief amici curiae of National Conference of State Legislatures, et al. filed.
Feb 12 1999 Brief amici curiae of Maryland, et al. filed.
Feb 12 1999 Brief amicus curiae of Kentucky filed.
Feb 25 1999 Motion of Solicitor General for divided argument filed.
Mar 8 1999 Motion of Solicitor General for divided argument GRANTED.
Mar 15 1999 Reply brief of petitioner United States filed.
Mar 16 1999 Reply brief of petitioners John Alden, et al. filed.
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No. _____

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

JOHN H. ALDEN, *et al.*,
Petitioners,
v.
STATE OF MAINE,
Respondent.

On Petition for a Writ of Certiorari to the
Maine Supreme Judicial Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state court refuse to entertain a federal statutory private party cause of action against a State or a state agency—such as the present state employee action against the State of Maine under the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*—on the basis of state sovereign immunity?

2. If a state court may properly refuse to entertain such a federal statutory private party action on the basis of state sovereign immunity in certain circumstances but not in others, may a state court do so in the circumstance in which that court entertains analogous state statutory actions?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs-Appellants below are John H. Alden, Walter Anderson, Lawrence D. Austin, Cynthia Ayer, David M. Barrett, Douglas L. Boothby, Nancy Bouchard, Randolph E. Brown, Elizabeth A. Buxton, Susan A. Carey, Richard E. Charest, David E. Cyr, Francis R. Cyr, Peter J. Deane, Joseph S. DeFilipp, Patrick T. Delahanty, Joseph J. Dentico, Daniel Dodge, Maura S. Douglass, Raymond Dzialo, David Eldridge, Scott R. Erickson, E. Donald Finnegan, Pauline N. Flagg, Richard H. Flanagan, William D. Francis, Lewis E. Frey, Richard Godin, Sandra J.C. Griffin, Pauline A. Greatedon Gudas, Normand W. Guay, Karen Hartnagle, Alexandria Helms, Alan Hybers, William W. Jackson, Betsy Jaegerman, William H. Jones, Wayne Libby, John H. Lorenzen, Richard E. Manning, Barbara J. Mascetta, Roman Maxsimic, Terry Michaud, Donna M. Miles, Jon A. Mills, Michael R. Morin, Lisa K. Nash, Martha Jo Nichols, Donald Paxton Parsley, Steven Onacki, J. Charles O'Roak, Nancy R. Peck, Susan P. Pierce, Lewis W. Randall, Michael K. Roach, Mark E. Sellinger, Alison B. Smith, David Snyder, Charles D. Strandberg, David G. Summers, Mark W. Warner, Joyce Williams, Francis P. Witts, Allen O. Wright and Corinne Zipps. Defendant-Appellee below is the State of Maine.

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PETITION FOR A WRIT OF CERTIORARI

John H. Alden *et al.*—the plaintiffs in the trial court and the appellants in the court below—respectfully petition for a writ of certiorari to review the decision and judgment of the Maine Supreme Judicial Court in *John H. Alden et al. v. State of Maine*, Com-97-446 (August 4, 1998).

OPINIONS BELOW

The decision of the Maine Supreme Judicial Court in this case is not yet officially reported and is reprinted as Appendix A hereto ("Pet. App."). The decision of the Superior Court for Cumberland County, Maine, in this case is unreported and is reprinted as Appendix B hereto.

JURISDICTION

The Maine Supreme Judicial Court entered judgment on August 4, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

RULE 29.4(b) CERTIFICATION

Since 28 U.S.C. § 2403(a) may apply and the United States is not a party hereto, copies of this *certiorari* petition are being served on the Solicitor General of the United States.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

Article I, Section 8 of the United States Constitution provides, in pertinent part:

The Congress shall have Power . . . to regulate Commerce . . . among the several States.

* * * *

Article VI, Clause 2 of the United States Constitution provides, in pertinent part:

This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in

every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The Eleventh Amendment to the United States Constitution provides:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.

Section 7(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 207(a)(1) provides, in pertinent part:

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b) provides, in pertinent part:

Any employer who violates the provisions of [29 U.S.C.] section 206 or 207 . . . shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation . . . and in an additional equal amount as liquidated damages . . . An action to recover the liability prescribed . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

STATEMENT OF THE CASE

1. In December, 1992, John Alden, as the first named plaintiff, and a group of other Maine parole and probation officers (hereafter parole officers), filed suit against the State of Maine in the United States District Court for the District of Maine to vindicate their Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, overtime rights. FLSA § 7, in this regard, obligates the States to compensate covered employees at premium rates for hours worked in excess of the applicable statutory threshold. 29 U.S.C. § 207. And, FLSA § 16(b) authorizes employee suits for monetary relief "against any employer (including a public agency) in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b).

The District Court sustained the parole officers' claim, in part, holding that they were "law enforcement" employees, 29 U.S.C. § 213(b)(20), entitled to overtime pay under the special provisions that apply to such employees, 29 U.S.C. § 207(k), and not, as Maine contended, exempt "professional" employees, 29 U.S.C. § 213(a)(1). *See, Mills v. Maine*, 853 F.Supp. 551, 552 (D. Me. 1994); 839 F.Supp. 3 (D. Me. 1993).

However, while the parole officers' federal action was pending, and before they received any back pay, this Court decided *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). On the strength of that decision, the District Court dismissed the parole officers' federal court action on Eleventh Amendment grounds, and its ruling was affirmed on appeal. *Mills v. State of Maine*, 1996 WL 400510 (D. Me. July 3, 1996), *aff'd*, 118 F.3d 37 (1st Cir. 1997).

In August 1996, just after the District Court's Eleventh Amendment ruling, the parole officers filed this action against the State of Maine in the Superior Court of Cumberland County, Maine, again alleging that the State had violated the FLSA overtime provisions. The Superior Court dismissed the parole officers' claim as barred by state

sovereign immunity, and did so over the parole officers' argument that the "FLSA, as federal law, is supreme under the Supremacy Clause and must be enforced by state courts." Pet. App. 22a.¹

The parole officers filed a timely appeal, raising two main points grounded in the Supremacy Clause.² *First*, state courts must enforce valid federal laws, such as the FLSA, notwithstanding any claim of state sovereign immunity. *Second*, Maine can not close its courts, on sovereign immunity grounds, to private actions against the State for monetary relief based on a claim under federal law when its courts are open to private actions against the State based on analogous claims under state law.³

The Maine Supreme Judicial Court by a 4-2 panel vote affirmed the Superior Court. That court read *Seminole Tribe* to confirm the view—expressed in earlier Maine Supreme Judicial Court decisions⁴—that the Eleventh

¹ The State also argued that the parole officers' claim was barred by the statute of limitations. The Superior Court rejected that argument, and the State did not appeal that ruling to the Maine Supreme Judicial Court.

² Appellants' Br. at 9-29; Appellants' Reply Br. generally.

³ In Maine, state sovereign immunity is a common-law judicial doctrine. State legislation creating a cause of action for private parties against the State, without anything more, overrides any claim of sovereign immunity. See, *Davies v. City of Bath*, 364 A.2d 1269, 1273 n.9 (Me. 1976) ("We are not bound, as are some jurisdictions, by a constitutional provision which requires sovereign immunity."). As a result, in Maine, the State is subject to suit by its employees under a wide variety of state laws: Maine Wage Statute, 26 M.R.S.A. §§ 664, 670; Maine Whistle Blower Statute, 26 M.R.S.A. § 833; Maine Family Medical Leave Act, 26 M.R.S.A. § 844; Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.*; Maine Workers Compensation Act, 39-A M.R.S.A. § 101 *et seq.*

⁴ *Drake v. Smith*, 390 A.2d 541 (Me. 1978); *Thiboutot v. State*, 405 A.2d 230 (Me. 1979), *aff'd on other grounds*, 448 U.S. 1 (1980);

Amendment embodies state sovereign immunity as a "background principle" of the federal Constitution that applies beyond the Amendment's literal terms to bar federal claims advanced in state court where those claims would be barred if brought in federal court. Pet. App. 6a. And, the Maine Court rejected the parole officers' contention that Maine discriminated against federal causes of action; that court reasoned that no Maine statute authorized the *precise* state employee statutory cause of action the parole officers had stated in their FLSA complaint. Pet. App. 6a-7a.⁵

REASONS FOR GRANTING THE WRIT

- The Article I legislative powers/state sovereign immunity questions presented by this case—and a myriad of like pending cases—follow on from the Article I/Eleventh Amendment question decided in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) with the same inevitability as the night follows the day. And, the questions presented here go to the very essence of Congress' law-making authority vis-a-vis the States within the Constitution's federal plan.

The *Seminole Tribe* Court held:

In overruling [*Pennsylvania v.*] *Union Gas* [Co. 491 U.S. 1(1989)] today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an

Jackson v. State, 544 A.2d 291 (Me. 1988), *cert. denied*, 491 U.S. 904 (1989); and *Moody v. Commissioner*, 661 A.2d 156 (Me. 1995).

⁵ The United States filed a brief as *amicus curiae* in support of the parole officers in both the Superior Court and the Maine Supreme Judicial Court. In the court below, the United States' position was that: "Because the [superior] court's ruling effectively invalidates an act of Congress, and because its ruling impairs a crucial enforcement mechanism for enforcing the [FLSA], the United States . . . urge[s] reversal." U.S. Br. at 1.

area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. [517 U.S. at 71-72; footnote omitted.]

The Fair Labor Standards Act, like many federal statutes, provides for the bringing of suits to enforce the Act by private parties in either a federal court or a state court of competent jurisdiction. See 29 U.S.C. § 216(b). And, of course, both the Eleventh Amendment and the *Seminole Tribe* decision speak directly only to the scope of the federal court jurisdiction over private party suits against a State. Moreover, prior to *Seminole Tribe*, this Court had repeatedly recognized that the Eleventh Amendment has no application to federal claims brought against a State in state court. E.g., *Hilton v. South Carolina Public Railways Comm'n.*, 502 U.S. 197, 204-05 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-64 (1989); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980); *Nevada v. Hall*, 440 U.S. 410, 420 (1979).

Against that background, the parole officers in this case—after bringing their FLSA suit in federal court and prevailing on the merits, pre-*Seminole Tribe*, and then being non-suited for lack of federal court jurisdiction, post-*Seminole Tribe*—filed their FLSA claim against the State of Maine in the Superior Court of Cumberland County, Maine. This suit is, moreover, only one of many such post-*Seminole Tribe* suits brought in various state courts. In this case, as in the other similar cases, the State responded by seeking to interpose a sovereign immunity bar to the plaintiffs' federal statutory claims bottomed on the Eleventh Amendment itself, the "background principle

of state sovereign immunity embodied in the Eleventh Amendment," *Seminole Tribe*, 517 U.S. at 72, or on the state law governing private party actions against the State.

This wave of litigation has now generated a direct conflict—predicated on conflicting readings of this Court's decisions—between the decision of the Arkansas Supreme Court in *Jacoby et al. v. Arkansas Department of Education*, 331 Ark. 508, 962 S.W.2d 773 (1998), pet. for cert. filed sub. nom. *Arkansas Department of Education v. Jacoby et al.* (No. 98-04), and the decision of the Maine Supreme Judicial Court here, as well as a set of conflicting intermediate and trial court decisions from eight other states.

The Arkansas Supreme Court in *Jacoby v. Arkansas Dept. of Ed.*, supra, rejected the state sovereign immunity claim made therein and did so in reliance on its reading of this Court's decisions. To the same effect see *Whittington v. State of New Mexico Dept. of Public Safety*, No. 19,065 (N.M. Ct. App., September 3, 1998); *Ahern et al. v. State of New York*, No. 80430, 1998 WL 386231 (N.Y. App. Div., July 9, 1998); *Bunch v. Robinson*, 122 Md. App. 437, 712 A.2d 585 (Md. Ct. Spec. App., 1998) pet. for cert. to Maryland Court of Appeals pending; *Raper v. State of Iowa*, No. CL 678918 (District Court for Polk County, October 23, 1997).

In contrast, the Maine Supreme Judicial Court in this case, placing great reliance on the *Seminole Tribe* decision, endorsed the State's sovereign immunity claim and non-suited the parole officers here for a second time. To the same effect see; *Allen v. Fauver*, No. ESX-L-3302-94 (N.J. Super. Ct. Law Div., 1998) on appeal to N.J. Super. Ct. App. Div. No. A-3795-9775; *German v. Wisconsin Dep't of Transportation*, No. 96-CV-1261 (Wis. Circuit Court, March 8, 1997); cf. *Keller v. Dailey*, No. 97 APEDS-658 1997 WL 781897 (Ohio App. 10 Dist. December 16, 1997)

There is, we believe, no need to belabor the sensitivity and difficulty—or the importance—of questions on the interplay between federal authority and state sovereign immunity such as those presented here. The convolutions in the law in this Court from *Chisolm v. Georgia*, 2 Dall. 419 (1793) though the Eleventh Amendment and on to *Seminole Tribe*, as well as the sheer number of decisions by the Court over the years attending to those questions and the continuing close divisions within the Court, make the case in that regard.

We do believe it worthy of emphasis, however, that the decision below goes well beyond *Seminole Tribe* and its precursors in limiting Congress' Article I law-making powers in an area of Congress' plenary authority. The Eleventh Amendment, after all, speaks only to the "Judicial Power of the United States." To be sure, the Court—in delineating that power—has "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Seminole Tribe*, 517 U.S. at 54, quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). And, as a result, the Court has given the Amendment effect to restrict federal court jurisdiction over cases other than those involving the "Article III diversity jurisdiction of the federal courts" that "the text of the Amendment would appear to restrict." *Seminole Tribe*, 517 U.S. at 54.

Be that as it may, it is a qualitatively different matter, we submit, to apply the Eleventh Amendment—or a general "presupposition" of state sovereign immunity that finds even an implicit expression in the Constitution only in the Eleventh Amendment—wholly outside the Article III realm. And, the doctrinal difficulties in that course pale in comparison to those entailed in recognizing an exception to the Supremacy Clause that saves out the state law of sovereign immunity from the otherwise overriding force of a federal statute enacted by Congress pursuant to its enumerated powers.

It is also very much to the point that the decision below denies Congress *all* authority to enact legislation within its enumerated Article I powers that both applies to certain conduct by the States and provides for private party judicial enforcement of the federal rights created thereby. The section of the FLSA providing for such private party enforcement of the Act against a covered State, for example, is rendered a dead letter by the decision below. Thus, that decision, at the very least, places a great strain on the rule of law and on our basic conceptions of due process in the vindication of federal statutory rights.⁶

The sum of the matter is this. The recurring Article I legislative powers/state sovereign immunity questions presented here are sensitive, difficult and important. The Arkansas Supreme Court in the *Jacoby* case and the Maine Supreme Judicial Court in this case have taken opposite positions based on their opposite readings of this Court's decisions. And, there is a split along the same lines in the lower court case law in other States. All this being so, the questions presented here—like the questions presented in *Seminole Tribe*—require this Court's authoritative answer.

I.

An on-going debate has been joined in the state courts, as pre-*Seminole Tribe* federal court suits against a State have been re-filed, and post-*Seminole Tribe* suits are being

⁶ As both the parole officers and the United States pointed out in the court below (see Appellants' Brief at 13 n.6; Appellants' Reply Brief at 12-13; U.S. Brief at 24 n.9), federally mandated FLSA wages constitute a property interest created by federal law, and thus the State's refusal to afford a federally mandated remedy (or indeed any adequate remedy) for the recovery of those wages, constitutes a deprivation of property without due process. Indeed, the federally mandated remedy may properly be viewed as an exercise of the power delegated to Congress under the Fourteenth Amendment to ensure that the States provide the redress needed to protect such property interests.

initiated, in state tribunals. The conflicting positions taken by the Arkansas Supreme Court in the *Jacoby* case and the Maine Supreme Judicial Court in this case are representative of the resulting division in the state courts.

(a) In the *Jacoby* case, as here, Arkansas employees, after non-suiting their federal court case in the wake of *Seminole Tribe*, filed a state court suit alleging non-payment by the State of overtime wages owing under the FLSA. As here, the Arkansas Department of Education argued that the employees' FLSA claims were barred by the Eleventh Amendment and/or the State's own law of sovereign immunity.

The Arkansas Supreme Court, in a unanimous decision, rejected that argument. The Arkansas Court noted: "In *Hilton* [*v. South Carolina Public Railways Comm'n*, 502 U.S. 17 (1991)], the Court made the point emphatically that the Eleventh Amendment does not apply to state courts. *Hilton*, 502 U.S. at 204-05, citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989); *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Nevada v. Hall*, 440 U.S. 410 (1979)." *Jacoby*, 962 S.W.2d at 775. And, the Arkansas Court added that where, as in *Hilton*, the federal statute "did impose liability on the states the [Supreme] Court concluded that the Supremacy Clause made that law fully enforceable against the states in state courts." 962 S.W.2d at 776. That logic applied equally to sustain the state employees' FLSA claims. *Id.*

The Arkansas Court relied upon *Howlett v. Rose*, 496 U.S. 356 (1990), cited in *Hilton*, to support the proposition that the States "may not exempt" themselves "from federal liability by relying on their own common-law heritage." *Jacoby*, 962 S.W.2d at 776, quoting *Howlett*, 496 U.S. at 383. For the same reason, the Arkansas Court held that the Arkansas employees' FLSA claims remained enforceable in state court regardless of any in-

munity provisions in the Arkansas Constitution. *Jacoby*, 962 S.W.2d at 777.⁷

Finally, the Arkansas Court recognized "that some ambiguous language in the *Seminole Tribe* opinion concerning 'unconsenting states' has been seized upon as support for the proposition that state consent is a prerequisite to state liability in its own courts for violation of a federal right." *Jacoby*, 962 S.W.2d at 778 citing Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?* 106 Yale L. J. 1683, 1717 (1997), citing *Seminole Tribe*, 517 U.S. at 72. But the Arkansas Court discounted these ambiguities—and similar dictum in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), and *Hans v. Louisiana*, 134 U.S. 1 (1890)—as "inconsequential" in light of *Hilton* and *Howlett*. *Jacoby*, 962 S.W.2d at 778.

The Arkansas Court thus concluded that "[i]n sum, we have no doubt that the weight of authority favors the employees in this matter. The FLSA now remains to be enforced against state employers only in state courts and is viable only by virtue of the Supremacy Clause." *Jacoby*, 962 S.W.2d at 778.

(b) In sharp contrast, in the instant case, the Maine Supreme Judicial Court read this Court's Eleventh Amendment decisions including *Seminole Tribe*, to authorize the precise state sovereign immunity bar rejected by the Arkansas Court. That conclusion flowed, in the Maine Court majority's view, from "the underlying premise of the Eleventh Amendment" which "reflects but one aspect of the states' inherent, more sweeping immunity from suits brought by private parties. A power so

⁷ In so holding, the Arkansas Court distinguished state court decisions from other jurisdictions, e.g. *Mossman v. Donahey*, 346 N.E.2d 305 (Ohio 1976); *Morris v. Massachusetts Maritime Academy*, 565 N.E.2d 422 (Mass. 1991), which had upheld state sovereign immunity to federal claims, on the ground that those decisions predated *Hilton*, "with its citation to *Howlett v. Rose*, *supra*." *Jacoby*, 962 S.W.2d at 778.

basic and profound would be an odd power indeed if it protected the states from suit in the federal courts but provided no comparable protection in their own courts." Pet. App. 6a.

The Maine Court majority found that *Seminole Tribe* "reinforces this position," Pet. App. 4a, and put aside *Hilton*, on which the Arkansas Court so heavily relied, by noting that:

[T]he [*Seminole Tribe*] Court spoke of the Amendment as reflecting a more fundamental principle of state sovereign immunity The Court stated: "[b]ehind the words of the constitutional provisions [t]here is . . . the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention." [*Seminole Tribe*, 517 U.S.] at 68 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323 (1934) (internal quotation and citation omitted)). [Pet. App. 5a-6a.]

The Maine Court dissenters, however, read *Seminole Tribe*, much as did the Arkansas Court, to limit only Article III jurisdiction, and not Congress' Article I powers: *Seminole Tribe*, they said "provides little guidance as to the proper resolution of this case: state courts are not Article III courts, and 'the Eleventh Amendment does not apply in state courts.'" Pet. App. 9a, quoting *Hilton*, 502 U.S. at 205. The dissenters added that the Maine Court majority decision "accords symmetry [between federal and state court immunities] undue weight, is devoid of any analysis of the FLSA, and does not address the Supremacy Clause." Pet. App. 10a. "To the extent that Maine's common law doctrine of sovereign immunity conflicts with the provisions of the FLSA which subject the State to liability in state court, the Supremacy Clause resolves that conflict in favor of the FLSA." *Id.* at 12a.

(c) The lower state court decisions in other jurisdictions cited pp. 7-8, *supra*, divide along essentially the same fault line reflecting the same sharp disagreement over the *Seminole Tribe* decision's significance.

Finding State sovereign immunity not to bar FLSA private claims: *Whittington v. State of New Mexico Dept of Public Safety*, Docket No. 19,065 (N.M. Ct. App., September 3, 1998) ("based on the previous decisions by the Supreme Court, we find that the Supremacy Clause requires the district court to enforce the FLSA notwithstanding the Department's assertion of state sovereign immunity"); *Ahern et al. v. State of New York*, No. 80430, 1998 WL 38623 at *2, July 9, 1998) (holding that *Seminole Tribe* and Eleventh Amendment treat with state immunity in federal fora and "not with the states' immunity from suit in any forum") (citations omitted); *Bunch v. Robinson*, 122 Md. App. 437, 712 A.2d 585, 595) (Md. Ct. Spec. App., 1998) petition for certiorari to Maryland Court of Appeals pending (holding that "*Seminole Tribe* neither overruled *Garcia* [v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)], nor repudiated the prior law from *Hilton* regarding the inapplicability of the Eleventh Amendment to state court actions"); *Raper v. State of Iowa*, No. CL 678918 (District Court for Polk County, October 23, 1997) (rejecting State's argument that "collapsed the doctrine of sovereign immunity and the Eleventh Amendment so that no real difference exists between the two.")⁸

⁸ The lower federal courts have joined in the debate, albeit in dictum, by expressing the view that the FLSA claims those courts were dismissing on Eleventh Amendment grounds could still be prosecuted in state courts. See, *Aaron v. Kansas*, 115 F.3d 813, 817 (10th Cir. 1997) ("[E]mployees can sue in state court for money damages under the FLSA as a state court of general jurisdiction is obligated by the Supremacy Clause to enforce federal law."); *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (1996), amended on petition for rehearing, 107 F.3d 358 (6th Cir. 1996) (same).

Finding State sovereign immunity to bar private FLSA actions: *Allen v. Fauver*, No. ESX-L-3302-94 (N.J. Super. Ct., February 17, 1998) on appeal to N.J. Super. Ct. Law Div. No. A-3795-9775 ("This Court agrees with the rationale of applying Eleventh Amendment principles to state common law immunity"); *German v. Wisconsin Dep't of Transportation*, No. 96-CV-1261 (Wis. Circuit Court, March 8, 1997); ("It would be anomalous if the 'states rights' justices who authored *Seminole Tribe* . . . acted to uphold states' Eleventh Amendment immunity from suit but, at the same time, affirmed congressional authority to overcome a state's own sovereign immunity under its state constitution."); cf. *Keller v. Dailey*, No. 97A-PEOS-658 1997 WL 781897 (Ohio App. 10 Dist. December 16, 1997).

* * * *

These jurisdictional papers are neither the time nor the place to plumb the depths of the Eleventh Amendment, the "presupposition" of state sovereign immunity that the Court has stated informs the Amendment, the force of the federal laws enacted pursuant to Congress' enumerated Article I powers by reason of the Supremacy Clause, or the dual function of the state courts in the enforcement of the federal law under the "Madisonian compromise" on the creation of the lower federal courts. For present purposes we rest on the proposition that the conflict below plainly requires plenary consideration and review by this Court. We add only, that, in our view, the Arkansas Supreme Court's decision is clearly correct in that it is strongly supported both by many of this Court's decisions and by the demands of the viable federalism envisioned by the plan of the Constitution.

II.

Whatever else may be true, the concept of a state sovereign immunity bar to a federal statutory private party cause of action in state court must rest on the core premise

that the State interposing the bar has such an immunity to interpose as a matter of positive law. If not—if the State has no such immunity to analogous state statutory private party actions—state court recognition of an immunity to federal actions is not an expression of the State's principled definition of its sovereignty but rather of the proposition, repeatedly *rejected* by this Court, that the state courts may "den[y] jurisdiction . . . based solely upon the source of the law sought to be enforced . . . [and] cast out [the plaintiff] because he is suing to enforce a federal act." *McKnett v. St. Louis & S.F. Railway Co.*, 292 U.S. 230, 233-34 (1934).

The Maine Supreme Judicial Court sanctioned just such a discrimination against the enforcement of federal claims in the Maine courts. In so doing the Maine Court erred and did so in a most fundamental respect.

The Maine Constitution and the Maine common law do *not* place any limit on the Maine legislature's power to subject the State to private party actions in the Maine courts seeking monetary remedies under state statutory law. As we have noted, p. 4 n.3 *supra*, the Maine legislature has in fact exercised its authority to enact a host of state laws which authorize state employees to bring suit against the State for damages, including wages owed. And, the Maine courts have uniformly entertained these state statutory actions. What the Maine courts will *not* do is entertain analogous federal statutory private party actions—these are met with a selective state sovereign immunity bar applicable only to such federal actions.

That, we submit, is contrary to the Supremacy Clause, which charges "state courts with a coordinate responsibility to enforce [federal] law according to their regular modes of procedure." *Howlett v. Rose*, 496 U.S. at 367. As the *Howlett* Court added, "[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are The two together form one system of juris-

prudence, which constitutes the law of the land for the State." 496 U.S. at 367, quoting *Clafin v. Houseman*, 93 U.S. 130, 136-137 (1876). For that reason, federal laws, such as the FLSA, passed by Congress acting within the scope of its Article I enumerated powers are as much a part of the law of Maine as laws passed by the Maine legislature.

In this regard, then, it is "settled that a state may not exercise its judicial power in a manner that discriminates between analogous federal and state causes of actions." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 776 n.1 (1982) (O'Connor, J., concurring and dissenting). States must make their courts equally "available for the vindication of federal as well as state created rights." *Id.* at 769. By opening and closing its courts through its selective state sovereign immunity bar, Maine practices just such an improper discrimination against federal causes of action analogous to state causes of actions.

The principle that states may not selectively favor state causes of action—or selectively disfavor federal causes of action—in state courts is, indeed, one of long standing. As the Court recognized in *Mondou v. New York*, 223 U.S. 1, 58 (191) (the *Second Employers' Liability Case*), the States must hear claims in their courts brought under the Federal Employees Liability Act ("FELA") when "their jurisdiction, as prescribed by local laws, is adequate to the occasion." The principle set forth in *Mondou* has been repeatedly reaffirmed. See, e.g., *Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211 (1916); *McKnett v. St. Louis & S.F. Railway Co.*, *supra*; *Testa v. Katt*, 330 U.S. 386 (1947). See also *F.E.R.C. v. Mississippi*, 456 U.S. at 760; *Martinez v. California*, 444 U.S. 277, 283, n.7 (1980). As the *Bombolis* Court put the matter:

[T]he principle upon which the [*Second Employer's Liability Case*] rested, while not questioning the diverse governmental sources from which state and na-

tional courts drew their authority, recognized the unity of the governments, national and state, and the common fealty of all courts, both state and national, to both state and national Constitutions, and the duty resting upon them, when it was within the scope of their authority, to protect and enforce rights lawfully created, without reference to the particular government from whose exercise of lawful power the right arose. [241 U.S. at 222-223.]

To be sure, the Maine Court rejected the parole officers' argument, grounded in this firmly established principle that state courts may not discriminate against federal claims, on the basis that no Maine law provides a claim for overtime *precisely* like the parole officers' federal claim. Pet. App. 7a. But, as the foregoing discussion demonstrates, this Court's decisions make plain that a state court is obligated to entertain federal claims where that state court entertains state claims of the "same type," even if those claims are not identical to the federal claims. *Testa v. Katt*, 330 U.S. at 394, emphasis added. And, the Maine courts, as noted above, entertain a wide variety of state employee state statutory law claims against the State for monetary relief. *Supra*, p. 4 n.3.

Thus, even if there are circumstances in which a state court may refuse to entertain a federal statutory cause of action such as the present one on sovereign immunity grounds—and we agree with the Arkansas Supreme Court that there are not—the decision below cannot stand in view of the Maine Court's recognition that there is no state sovereign immunity bar to analogous state statutory law private party actions.

CONCLUSION

For the above stated reasons this petition for a writ of certiorari to the Maine Supreme Judicial Court should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME JUDICIAL COURT OF MAINE

Cum-97-446

JOHN H. ALDEN *et al.*

v.

STATE OF MAINE

August 4, 1998, Decided

WATHEN, C.J., and ROBERTS, CLIFFORD, RUDMAN, DANA, and SAUFLEY, JJ. Majority: WATHEN, C.J., and ROBERTS, CLIFFORD, and SAUFLEY, JJ. Dissenting: RUDMAN and DANA, JJ.

OPINION

ROBERTS, J.

John H. Alden¹ appeals from the judgment of the Superior Court (Cumberland County, Calkins, J.) dismissing on the basis of sovereign immunity his complaint brought pursuant to the federal Fair Labor Standards Act. Alden contends that the doctrine of sovereign immunity may not be interposed to defend against this federally created cause of action. We affirm the judgment.

¹ Alden is joined by 66 additional plaintiffs, all present or former state probation officers. For clarity, and because the central issue on appeal is identical for all plaintiffs, we refer only to Alden.

In December 1992 Alden, a state probation officer, filed a complaint against the State in federal district court seeking overtime pay pursuant to the Fair Labor Standards Act (FLSA). While that claim was pending, the Supreme Court of the United States decided *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996), which held, on the basis of the Eleventh Amendment to the United States Constitution, that Congress may not authorize pursuant to its Article I powers suits in federal court by private parties against unconsenting states. 517 U.S. at 72-73. Relying on *Seminole Tribe*, the federal district court dismissed Alden's claim for lack of subject matter jurisdiction. *Mills v. State*, 1996 U.S. Dist. LEXIS 9985, 1996 WL 400510 (D. Me. July 3, 1996), *aff'd*, 118 F.3d 37 (1st Cir. 1997).

Alden then filed essentially the same complaint in the Superior Court in August 1996. The State moved for a judgment on the pleadings pursuant to M.R. Civ. P. 12(c), stating as grounds the doctrine of state sovereign immunity and the statute of limitations. Although the court found that Alden's claim was not barred by the statute of limitations, it granted the State's motion on the ground of sovereign immunity. Alden's appeal followed.

The principal issue before us is whether state sovereign immunity, as reflected in the Eleventh Amendment, protects the State from this federally created cause of action in its own courts. Alden contends that Congress has abrogated the State's sovereign immunity by enacting the FLSA. We disagree. Although Congress may have intended to subject the states to the overtime provisions of the FLSA, it does not have the necessary power, pursuant to the Constitution, to accomplish this end.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of

another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. AMEND. XI. "Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Seminole Tribe*, 517 U.S. at 54 (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 115 L. Ed. 2d 686, 111 S. Ct. 2578 (1991)). That presupposition consists of two elements: "that each State is a sovereign entity in our federal system . . . and . . . that 'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" *Id.* (quoting *The Federalist* No. 81, at 487 (Alexander Hamilton) (Clinton Rositer ed. (1961)) (citations omitted)).

We have concluded on several occasions that sovereign immunity does protect the State from suit by private parties in its own courts without its consent, even when the cause of action derives from federal law. In *Drake v. Smith*, 390 A.2d 541 (Me. 1978), we considered the question whether the State's enactment of a statutory scheme whereby it became a partner with the federal government in paying medical care costs of certain recipients of federal aid constituted a waiver of state sovereign immunity. We held that because the State had not waived its Eleventh Amendment immunity from suit in federal court, it was not reasonable to conclude that it had waived its sovereign immunity to the same suit in state court. *Id.* at 546.

In *Thiboutot v. State*, 405 A.2d 230 (Me. 1979), *aff'd* on other grounds, 448 U.S. 1, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980), we addressed the amenability of the State to suits by private parties for retroactive AFDC benefits pursuant to 42 U.S.C. § 1983. We held that "in the absence of waiver by the state of its sovereign immunity, the state may constitutionally interpose that immunity as a bar to a class action brought in a state court under . . .

§ 1983.” 405 A.2d at 237. Similarly, in *Jackson v. State*, 544 A.2d 291 (Me. 1988) cert. denied, 491 U.S. 904, 105 L. Ed. 2d 694, 109 S. Ct. 3185 (1989), addressing the State’s amenability to suit under the federal Rehabilitation Act, 29 U.S.C. § 794, we held that “the State may constitutionally interpose its sovereign immunity in state court as a bar to an award of damages under the Rehabilitation Act.” *Id.* at 298. Most recently, *Moody v. Commissioner, Dept. of Human Servs.*, 661 A.2d 156 (Me. 1995), concerned the AFDC program and a violation by the Department of Human Services of the due process rights of the plaintiffs. In reaching the conclusion that the State is protected by sovereign immunity from suit in its own courts, we stated: “The Eleventh Amendment to the United States Constitution precludes the federal courts from circumventing the sovereign immunity of the states. Although the Eleventh Amendment is not directly applicable to state courts, the doctrine of sovereign immunity similarly protects the states from actions [in] state courts.” *Id.* at 158 n.3 (citation omitted).

Reading these decisions in combination, it is clear that we have looked to the Eleventh Amendment to define the contours of state sovereign immunity. If Congress cannot force the states to defend in federal court against claims by private individuals, it similarly cannot force the states to defend in their own courts against these same claims. In reaching this conclusion, we have found that the Eleventh Amendment and state sovereign immunity are analogous, to the extent that both protect the State from being forced by an act of Congress to defend against a federal cause of action brought by a private individual. To hold otherwise, by concluding that a state, immune from suit in federal court, must defend against that same suit in its own courts, would effectively vitiate the Eleventh Amendment.

The Supreme Court’s opinion in *Seminole Tribe* reinforces this position. The Court began its analysis with the general proposition that in order to abrogate a state’s

sovereign immunity Congress must have “‘unequivocally expressed its intent to abrogate the immunity,’” and must have done so “‘pursuant to a valid exercise of power.’” *Seminole Tribe*, 517 U.S. at 55 (quoting *Green v. Mansour*, 474 U.S. 64, 68, 88 L. Ed. 2d 371, 106 S. Ct. 423 (1985)). Addressing the first element, the Court concluded that it is “indubitable that Congress intended through the [FLSA] to abrogate the States’ sovereign immunity from suit.” 517 U.S. at 57.

The Court then addressed the second element, namely, whether Congress has the power to abrogate sovereign immunity in this manner. Concluding that the Eleventh Amendment deprives Congress of this power, the Court stated that the Amendment “serves to avoid ‘the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.’” *Id.* at 58 (quoting *Puerto Rico Aqueduct & Sewer Auth v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146, 121 L. Ed. 2d 605, 113 S. Ct. 684 (1993)). To suggest, as Alden has done, that this indignity would be lessened by simply dragging the State into a different forum misconstrues the underlying premise of the Eleventh Amendment.

The Eleventh Amendment does not explicitly protect the states from suit in their own courts. *Hilton v. South Carolina Pub. Rys. Comm’n*, 502 U.S. 197, 204-05, 116 L. Ed. 2d 560, 112 S. Ct. 560 (1991). That does not, however, end the inquiry. In reaching its conclusion in *Seminole Tribe*, the Court spoke of the Amendment as reflecting a more fundamental principle of state sovereign immunity: “For over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment.” *Seminole Tribe*, 517 U.S. at 66. The Court stated:

Behind the words of the constitutional provisions are postulates which limit and control. . . . There is . . . the postulate that States of the Union, still

possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention.

Id. at 68 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323, 78 L. Ed. 1282, 54 S. Ct. 745 (1934) (internal quotation and citation omitted)). The postulate at work here, state sovereign immunity, is a “background principle” that is “embodied in the Eleventh Amendment.” 517 U.S. at 72. Thus the Eleventh Amendment does not delimit the scope and effect of state sovereign immunity. Rather, it reflects but one aspect of the states’ inherent, more sweeping immunity from suits brought by private parties. A power so basic and profound would be an odd power indeed if it protected the states from suit in the federal courts but provided no comparable protection in their own courts. If Congress does not have the power to abrogate state sovereign immunity with respect to federal causes of action brought in federal courts, as the Seminole Tribe case clearly held, then that limitation on congressional power may not be circumvented simply by moving to a state court. Accordingly, we conclude that sovereign immunity protects the State from defending this federal cause of action in its own courts.

Alden contends, in the alternative, that the State has waived its sovereign immunity by implication, having enacted several statutes whereby the State has made itself amenable to suit in the area of state employee wage claims. Conspicuously absent from Alden’s list of statutes affecting the wages and employment rights of state employees is 26 M.R.S.A. § 664(3) (Supp. 1997), which is the only statutory provision directly relevant to the central issue on appeal—the State’s amenability to suit by state employees for overtime pay. That section provides, “The overtime provision of this section does not apply to public employees,” *id.*, who are defined as “any

person[s] whose wages are paid by . . . the State.” *Id.* § 663(10) (1988).

We have stated that in the absence of a specific statutory waiver of immunity, “a legislative waiver of the sovereign’s immunity from suit may be found implicit in a general scheme plainly contemplating that the State will become party to particular kinds of contracts.” *Drake*, 390 A.2d at 545. In the present instance, however, it is impossible to find an implied waiver in a larger statutory scheme when the Legislature has spoken explicitly on the point. Any implications of these statutory provisions are limited by the Legislature’s unambiguous statement that the State is not subject to the overtime requirement.

The entry is:

Judgment affirmed.

DANA, J., with whom RUDMAN, J., joins, dissenting.

I must respectfully dissent. Contrary to the Court’s conclusion, the Eleventh Amendment does not define the scope of state sovereign immunity. Although the Supreme Court’s decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996), precludes Alden from prosecuting this action in federal court, neither Seminole Tribe nor the Supremacy Clause permits the State to interpose its sovereign immunity as a defense to a suit alleging a violation of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201-219 (1965, 1978 & Supp. 1998), that is maintained in state court.

Pursuant to the FLSA, an employee may bring an action alleging violations of, inter alia, the minimum wage and maximum hours provisions of the act, “against any employer (including a public agency) in any Federal or State court of competent jurisdiction . . .” *Id.* § 216(b) (Supp. 1998). This provision clearly expresses a congressional intent to abrogate the states’ immunity from

suit. The Court concludes that Congress lacks the authority to abrogate the states' immunity from FLSA actions prosecuted in state courts by relying on Seminole Tribe, a reliance that is misplaced.

In *Seminole Tribe*, the Supreme Court determined that the Indian Commerce Clause does not grant Congress the authority to abrogate the states' Eleventh Amendment immunity. See 517 U.S. at 47. Prior to the *Seminole Tribe* decision, the Supreme Court had found only two constitutional provisions that provided Congress with the authority to abrogate Eleventh Amendment immunity: the Fourteenth Amendment, see *Fitzpatrick v. Bitzer*, 427 U.S. 445, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976); and the Interstate Commerce Clause, see *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989). See *Seminole Tribe*, 517 U.S. at 59. The Court agreed with the *Seminole Tribe*'s contention that "there is no principled basis for finding that congressional power under the Indian Commerce Clause is less than that conferred by the Interstate Commerce Clause," *id.* at 60-62, but it overruled the holding of *Union Gas* that the Interstate Commerce Clause grants Congress the power to abrogate Eleventh Amendment immunity, see *id.* at 66. The Court reasoned that the holding of *Union Gas* "deviated sharply" from the well-established constitutional principle that the Eleventh Amendment "limited the federal courts' jurisdiction under Article III," and it rejected the conclusion of the *Union Gas* plurality "that Congress could under Article I expand the scope of the federal courts' jurisdiction under Article III." *Id.* at 63. The Court emphasized that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 73.

In *Seminole Tribe*, therefore, the Court determined that Congress had exceeded its Article I powers by seeking to expand the jurisdiction of Article III courts beyond the limits imposed by the Eleventh Amendment. That deci-

sion provides little guidance as to the proper resolution of this case: state courts are not Article III courts, and "the Eleventh Amendment does not apply in state courts," *Hilton v. South Carolina Pub. Ry. Comm'n*, 502 U.S. 197, 205, 116 L. Ed. 2d 560, 112 S. Ct. 560 (1991). See also *Bunch v. Robinson*, 712 A.2d 585, 1998 Md. App. LEXIS 134, *30-31, 1998 WL 348429, at *11 (Md. Ct. Spec. App. 1998) ("The Eleventh Amendment addresses the susceptibility of a state to suit in federal court, not the general immunity of a state from private suit"). In contrast, the analytical framework set forth in *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 116 L. Ed. 2d 560, 112 S. Ct. 560 (1991), sheds considerable light on our inquiry.

In *Hilton*, the Court considered whether the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (1986), permits a cause of action against state-owned railroads in state courts. See 502 U.S. at 199. The Court had held in 1964 that FELA authorizes damages suits against state-owned railroads, and that states waive their Eleventh Amendment immunity by engaging in the railway business. See *Parden v. Terminal Ry. of Alabama Docks Dep't*, 377 U.S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207 (1964). The Court reconsidered the *Parden* holding in 1987, however, and concluded that FELA, as incorporated by the Jones Act, 46 U.S.C. app. § 688 (Supp. 1998), did not abrogate states' Eleventh Amendment immunity. See *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 97 L. Ed. 2d 389, 107 S. Ct. 2941 (1987).

Rejecting a contention that the *Welch* decision controlled its inquiry, the Court in *Hilton* concluded that FELA does authorize causes of action against the states in their courts. See *Hilton*, 502 U.S. at 203. The Court reasoned:

the most vital consideration of our decision today, which is that to confer immunity from state-court

suit would strip all FELA and Jones Act protection from workers employed by the States, was not addressed or at all discussed in the Welch decision. Indeed, that omission can best be explained by the assumption . . . that the Jones Act (and so too FELA) by its terms extends to the States. This coverage, and the jurisdiction of state courts to entertain a suit free from Eleventh Amendment constraints, is a plausible explanation for the absence in Welch of any discussion of the practical adverse effects of overruling that portion of Parden which pertained only to the Eleventh Amendment, since continued state-court jurisdiction made those effects minimal.

Id. at 203-04 (footnote omitted) (emphasis added). The Court observed that the issue in Hilton "is different from the issue in our Eleventh Amendment cases in a fundamental respect: The latter cases involve the application of a rule of constitutional law, while the former case[] applies an ordinary rule of statutory construction." *Id.* at 205 (quotation omitted) (emphasis added). Although the Court's construction of FELA relied heavily upon Parden and stare decisis, it observed that the "primary focus" of a statutory construction should be "the language and history" of the statute. *Id.* at 205. The Court cautioned that although the scope of Eleventh Amendment immunity is "a relevant consideration," achieving symmetry between a state's liability in state and federal courts should not be imperative. *Id.* at 205-06. The Hilton decision concluded that because FELA imposes liability upon the states, "the Supremacy Clause makes that statute the law in every State, fully enforceable in state court." *Id.* at 207.

The Court's decision in this case accords symmetry undue weight, is devoid of any analysis of the FLSA, and does not address the Supremacy Clause. A different, and in my opinion better, approach is illustrated by the recent decision of the Arkansas Supreme Court in *Jacoby v. Arkansas Department of Education*, 331 Ark. 508, 962

S.W.2d 773 (1998). In *Jacoby*, the court concluded that neither the Eleventh Amendment nor the sovereign immunity provision of the Arkansas Constitution² prevents state employees from maintaining an FLSA cause of action against the state in state court. See 962 S.W.2d at 775-78; see also *Ribitzki v. School Bd. of Highlands County*, 710 So. 2d 226 (Fla. Dist. Ct. App. 1998) (holding that the Eleventh Amendment does not immunize the state from an FLSA action in state court); *Bunch*, 712 A.2d 585, 1998 WL 348429 (holding that the Supremacy Clause requires state courts to enforce the FLSA against the states and that the scope of states' sovereign immunity from suit in their own courts is not coterminous with their Eleventh Amendment immunity). The *Jacoby* court determined that the Seminole Tribe decision was not conclusive "of state liability in its own courts." 962 S.W.2d at 777. The court reasoned that pursuant to the Supremacy Clause, the FLSA must be treated as much the law of Arkansas as laws passed by the Arkansas legislature. See *id.* at 775. The court observed that "state employees . . . are clearly entitled to file FLSA claims against state agencies as employers"; that "the FLSA expressly provides that state courts have jurisdiction over these claims"; and that the FLSA is "the law throughout the land, and state sovereign immunity cannot impede it." *Id.* at 777.

The Supreme Court has decided that Congress acted within its Article I powers and did not violate the Tenth Amendment when it provided state employees with the protections afforded by the FLSA. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-56, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985), reh'g denied, 471 U.S. 1049, 85 L. Ed. 2d 340, 105 S. Ct. 2041

² Pursuant to Article 5, section 20 of the Arkansas Constitution, "the State of Arkansas shall never be made a defendant in any of her courts."

(1985).³ Pursuant to the Supremacy Clause, "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const. art. 6. As the Supreme Court explained in *Howlett v. Rose*.

federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular mode of procedure.

496 U.S. 356, 367, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990). "When Congress acts within its enumerated powers to create a federal cause of action that imposes liability on the states, state courts of general jurisdiction may not refuse to hear the federal claim." *Bunch*, 712 A.2d 585, 1998 Md. App. LEXIS 134 at *13, 1998 WL 348429, at *5. To the extent that Maine's common law doctrine of sovereign immunity conflicts with the provisions of the FLSA which subject the State to liability in state court, the Supremacy Clause resolves that conflict in favor of the FLSA. Cf. *Howlett*, 496 U.S. at 377-78 (rejecting interpretation of Florida's sovereign immunity statute that rendered all state subdivisions immune from section 1983 actions maintained in Florida courts and

³ In *Garcia*, the Court observed that federal supervision over "the judicial action of the States is . . . permissible . . . as to matters by the Constitution specifically authorized or delegated to the United States." 469 U.S. at 549 (quotation and citation omitted). The Court reasoned: "we perceive nothing in the overtime and minimum-wage requirements of the FLSA . . . that is destructive of state sovereignty or violative of any constitutional provision." *Id.* at 554.

concluding, "to the extent that the Florida law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law.").

A determination that the Supremacy Clause requires states to defend FLSA causes of action that are prosecuted in state courts, contrary to the Court's concern, would not "vitiate the Eleventh Amendment." Such a determination would not strip the State of its sovereign immunity whenever a litigant sought to prosecute a federally-created cause of action against it. The FLSA's express authorization of suits against state employers in state courts constitutes an explicit statement of congressional intent to abrogate the states' immunity from suit in their own courts. If a statute creating a federal cause of action does not contain an express statement of congressional intent to abrogate states' immunity, then a state could successfully interpose its sovereign immunity as a defense to that cause of action.⁴ See *Hilton*, 502 U.S. at 206 ("When the issue to be resolved is one of statutory construction, of congressional intent to impose monetary liability on the States, the requirement of a clear statement by Congress to impose such liability creates a rule that ought to be of assistance to the Congress and the courts in drafting and interpreting legislation.").

I would vacate the judgment of the Superior Court.

⁴ Similarly, the Maine Legislature may waive the State's sovereign immunity only by enacting "a general law plainly conferring the State's consent to be sued as to a class of cases," or by dealing "specifically with a particular action sought to be brought against the State and giving its plainly stated consent that the State be sued in that action." *Drake v. Smith*, 390 A.2d 541, 544 (Me. 1978). Thus, the ability of Congress, when enacting valid legislation, to abrogate the State of Maine's immunity from suit in its own courts parallels the Maine Legislature's ability to waive the State's sovereign immunity.

APPENDIX B

STATE OF MAINE
CUMBERLAND, ss:

SUPERIOR COURT

Civil Action Docket No. CV-96-751

JOHN H. ALDEN, *et al.*,
Plaintiffs

v.

STATE OF MAINE,
Defendant

DECISION AND ORDER

The named plaintiffs in this case number approximately 65. They are all employed by the Defendant State of Maine as probation officers and juvenile caseworkers. In this action they allege that Maine owes them money for overtime work for which they should have been paid pursuant to the Fair Labor Standards Act (FLSA). 29 U.S.C. §§ 201 *et seq.*

An identical lawsuit was filed by many of these same plaintiffs in federal court on December 21, 1992. The federal court held that the provisions of FLSA prohibited Maine from excluding the plaintiffs from coverage of FLSA. *Mills v. State of Maine*, 839 F. Supp. 3, 4 (D. Me. 1993). It later held that liquidated damages and back pay for a two year period would be awarded to the plaintiffs. *Mills v. State of Maine*, 853 F. Supp. 551, 555, 556 (D.Me. 1994). The matter was referred to a special master for a determination on the amount of back pay owed to each plaintiff. Both parties filed objections to

the master's report. Before a final judgment could be entered by the court, the case of *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996) was decided. Relying upon the holding in *Seminole*, the federal court determined that it lacked subject matter jurisdiction because Maine had not waived its Eleventh Amendment Rights.¹ The court dismissed the complaint, and the First Circuit affirmed the dismissal. *Mills v. State of Maine*, No. 92-410-P-H, 1996 WL 400410 (D. Me. July 3, 1996), *aff'd* — F.3d —, No. 96-1973, 1997 WL 361186 (1st Cir. July 7, 1997). The First Circuit held that, although Congress expressly intended to abrogate state immunity in FLSA actions in federal court, Congress did not have the power to do so under the Commerce Clause, the source of Congress' power to enact FLSA. The court further held that FLSA was not enacted pursuant to section 5 of the Fourteenth Amendment, which is a source of power by which Congress can abrogate sovereign immunity.

While the *Mills* case was pending, pursuant to a collective bargaining agreement, Maine began paying the probation officers and juvenile caseworkers for overtime, as of February 6, 1994.

On July 31, 1996, the plaintiffs filed the instant action. Maine's answer sets forth the affirmative defenses of sovereign immunity and statute of limitations, among others. Plaintiffs brought a motion to dismiss these two defenses,

¹ *Seminole* involved the Indian Gaming Regulatory Act which required states to negotiate with tribes and authorized suit against the state to compel performances of the state's duty under the Act. The Supreme Court held that "notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power . . ." *Seminole*, 116 S. Ct. at 1119. The Court expressly overturned *Pennsylvania v. Union Gas Co.* 491 U.S. 1 (1989) which had held that the Commerce Clause gave Congress the power to abrogate States' immunity under the Eleventh Amendment.

and Maine moved for judgment on the pleadings pursuant to Rule 12(c).

I. Statute of limitations

The statute of limitations for violations of FLSA is two years, unless the violation is willful, in which case the period of limitations is three years. 29 U.S.C. § 255. In the federal court action, the plaintiffs sought FLSA remedies for three years prior to the filing of the action which was on December 21, 1992. It is not disputed that Maine has paid overtime to the plaintiffs since February 6, 1994. In this action the plaintiffs are seeking damages for the period of December 21, 1989 to February 6, 1994.

Maine argues that the two year period of limitations is applicable and that since this action was not filed until July 31, 1996, which was more than two years after Maine started paying overtime to the plaintiffs, the action must be dismissed. Maine points out that the federal court held that the two year period applied instead of the three year period because the violation was not willful. *Mills*, 853 F. Supp. at 555. The plaintiffs claim that the statute of limitations was tolled during the pendency of their federal action. Both parties acknowledge that federal law on limitations applies in this case because it is a federal statute of limitations that is at issue.

The Supreme Court held that the doctrine of equitable tolling is available in federal cases. *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 434-35 (1965). In *Burnett* the plaintiff filed a claim under the Federal Employers' Liability Act (FELA) in state court, but the action was dismissed for improper venue. A few days later the plaintiff filed the same action in federal court, but it was dismissed because the statute of limitations had run. Because the state action had been brought in a timely fashion and because the defendant was not unfairly surprised by the filing of the federal action, equitable

tolling was appropriate. The Court held that equitable tolling furthered the policies and remedial purposes of FELA.

Many other federal cases have relied on *Burnett* and applied equitable tolling to a variety of federal limitations statutes including cases in which the defendant is a governmental entity.² *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). The courts look at whether the doctrine of equitable tolling will effectuate the purpose of the statutory scheme; whether the plaintiff has been diligent; and whether the defendant will be surprised by the revival of a stale claim.³ Another factor utilized by the courts in deciding whether to allow equitable tolling is that the first action be filed in a court with apparent jurisdiction.⁴

Relating these factors to the instant case, it is apparent that the doctrine of equitable tolling should be applied. It can hardly be said that equitable tolling would not further the policies and purposes of FLSA which are set forth in 29 U.S.C. § 202. It is a remedial statute designed to correct and eliminate working conditions that are detrimental to the health and well-being of workers. An integral portion of the scheme is the right to collect wages that have been wrongfully withheld. Allowing the plaintiffs to finish in state court what they started to do in federal court furthers the policies of FLSA. Maine cannot claim unfair surprise nor complain about the staleness of the claims. Both parties had been working

² For a list of such cases see *Webb v. United States*, 66 F.3d 691, 696 (4th Cir. 1995).

³ Where the plaintiff has been diligent and the defendant has been given notice of the claim, equitable tolling is appropriate. *Farrell v. Automobile Club of Michigan*, 870 F.2d 1129, 1134 (6th Cir. 1989) (allowed equitable tolling when ERISA claim brought in state court).

⁴ Filing an action in a court that clearly lacks jurisdiction will not toll the statute of limitations. *Farrell*, 870 F.2d at 1133.

toward a resolution of each individual plaintiff's claim before the *Seminole* decision forced the federal court to stop the proceedings. Since the date of the filing of the federal suit Maine has been on notice that claims for unpaid overtime were being made. The requirement that the first court have apparent jurisdiction has been met in this case; the *Mills* court had jurisdiction until the decision in *Seminole*.

II. Sovereign Immunity

Maine submits that the doctrine of sovereign immunity bars the plaintiffs from obtaining any monetary damages from it. In support of this proposition, Maine relies upon four cases: *Moody v. Commissioner, Dept. of Human Services*, 661 A.2d 156 (Me. 1995); *Jackson v. State*, 544 A.2d 291 (Me. 1988), *cert. denied*, 491 U.S. 904 (1989); *Thiboutot v. State*, 405 A.2d 230 (Me. 1979), *aff'd on other grounds*, 448 U.S. 1 (1980); and *Drake v. Smith*, 390 A.2d 541 (Me. 1978).

Drake involved payments owed to a nursing home by the Maine Department of Human Services under a federal/state welfare program. The trial court ordered the Department to pay the nursing home, but the Law Court held that sovereign immunity required dismissal of the action.⁵ The court held that because the Maine Legislature had not waived the Eleventh Amendment immunity of the state to be sued in federal court for violations of the welfare program, it was not reasonable to believe that the Legislature had waived sovereign immunity protection in the state courts. *Drake*, 390 A.2d at 546.

Thiboutot involved benefits under Aid to Families with Dependent Children (AFDC) in which the court determined that the Maine Department of Human Services had violated the federal AFDC statute. The plaintiffs re-

⁵ The Law Court declined to determine whether dismissal was required because of a lack of jurisdiction or for the absence of a cause of action. *Drake*, 390 at 543.

quested retroactive relief. The trial court's decision to deny retroactive benefits to members of the plaintiff class was upheld by the Law Court. Relying upon Supreme Court cases which held that the Eleventh Amendment barred recovery of retroactive benefits against a state in federal court, the Law Court held that state sovereign immunity likewise barred the award of retroactive benefits in state court. *Thiboutot*, 405 A.2d at 236-37.

In *Jackson*, the plaintiff sued the State for violation of his rights under the federal Rehabilitation Act. The trial court ordered the State to pay damages. The Law Court reversed the damages award against the State:

For reasons similar to those expressed in *Thiboutot*, and still without conviction that this federal issue has been finally resolved, we conclude that the State may constitutionally interpose its sovereign immunity in state court as a bar to an award of damages under section 504 of the Rehabilitation Act.

Jackson, 544 A.2d at 298. The Law Court relied upon *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), in which the Supreme Court had held that states were immune from suit in federal court for violations of the Rehabilitation Act.

Moody involved the AFDC program and a violation of the due process rights of the plaintiffs by the Maine Department of Human Services. A similar case was brought in the federal court which found that the Department had violated the plaintiffs' rights under the AFDC statute. The Department stopped the violation and complied with the federal decision. The trial court in the state action ordered the Department to notify members of the plaintiff class of their rights to certain payments, and the Law Court reversed. Since there was no ongoing violation of the law, the only purpose of the notice was to provide a means for the class members to seek retroactive payments. The Law Court held that an award of retroactive monetary

relief was the same as damages to be paid from state funds and was barred by sovereign immunity. In a footnote, the Court stated:

The Eleventh Amendment to the United States Constitution precludes the federal courts from circumventing the sovereign immunity of the states. Although the Eleventh Amendment is not directly applicable to state courts, the doctrine of sovereign immunity similarly protects the states from actions of state courts.

Id. at 158, n.3. (Citations to *Thiboutot* and *Drake* omitted).

In a concurring opinion in *Moody*, Justice Lipez agreed that prior decisions of the Law Court mandated the result, but he found it "difficult to reconcile with the Supremacy Clause of the Federal Constitution." He agreed that the past decisions of the Law Court had relied upon Eleventh Amendment jurisprudence in the development of the sovereign immunity doctrine in Maine. Because the parties had not challenged that reliance, he found the *Moody* case an inappropriate one to examine whether the Eleventh Amendment principles should continue to be incorporated into the state sovereign immunity doctrine.

These four Maine cases make it apparent that in Maine the doctrine of state sovereign immunity has incorporated the principles of Eleventh Amendment immunity. Simply put, if a plaintiff can't seek damages against the state for violations of a federal law in federal court, the plaintiff can't seek damages in state court either.

Eleventh Amendment jurisprudence is the subject of much debate as can be seen from the vigorous dissents in *Seminole*. The majority accepted the historical view that the understanding of the framers of the United States Constitution was that states were immune as sovereigns. When it became apparent in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), that the Supreme Court did not

share that general understanding, the Eleventh Amendment was quickly adopted. *Seminole*, 116 S.Ct. at 1130. For over a century a majority of the Court has recognized that the intent of the Amendment was broader than its literal meaning, and in interpreting the Amendment, the Court has gone beyond the plain meaning of its words. *Hans v. Louisiana*, 134 U.S. 1 (1890). The Amendment, as interpreted, bars all actions for money damages against states in federal court brought by anyone, unless the state has consented to suit. The Court speaks of the Eleventh Amendment as though it were synonymous with common law sovereign immunity. "[E]ach state is a sovereign entity . . . and . . . [i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole*, 116 S.Ct. at 1122 (citations and quotations marks deleted). Although there are other views on the subject of sovereign immunity as demonstrated by the dissents in *Seminole*, it is certainly rational for the Law Court to continue to apply Eleventh Amendment principles to state sovereign immunity.

Maine is not alone in relying upon Eleventh Amendment principles to form and illuminate state sovereign immunity law. Following a thorough discussion of the history of the Eleventh Amendment, the Ohio Supreme Court in *Mossman v. Donahey*, 346 N.E. 2d 305 (Ohio 1976) held that the reasoning and purpose of the Eleventh Amendment applied to suits in state courts as well. "[S]tate sovereign immunity is a right of constitutional proportions, whether it is considered to derive from the plan of the Constitution itself, or from the Eleventh Amendment. . . ." *Mossman*, 346 N.E. 2d at 312. *Accord Morris v. Massachusetts Maritime Academy*, 565 N.E. 2d 422 (Mass. 1991).⁶

⁶ The memorandum of the Secretary of Labor suggests that *Morris* is no longer good law because of the decision of the Supreme Court in *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197

The plaintiffs seek to distinguish the instant case from the four Law Court cases relied upon by Maine. They correctly point out that the Supremacy Clause was not discussed in those four cases. They further argue that if those cases elevate sovereign immunity over the Supremacy Clause, they are wrongly decided and unconstitutional.

The plaintiffs argue that because FLSA unequivocally provides for the recovery of damages from states who have violated the FLSA provisions, the state courts must award such damages when violations are proven. They argue that FLSA, as federal law, is supreme under the Supremacy Clause and must be enforced by state courts. Some federal courts have suggested in dicta that such is the case. In *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996), the court dismissed a FLSA action by

(1991). In *Morris* the issue was whether state sovereign immunity could be asserted in a Jones Act case. *Hilton* held that FELA and the Jones Act created a cause of action against states enforceable in state courts. Although the actual holding in *Morris* has been modified by *Hilton*, the proposition in *Morris*, that states look to Eleventh Amendment law to elucidate the states' sovereign immunity law, was not disturbed.

Hilton is a difficult case to place in the framework of the Court's Eleventh Amendment jurisprudence, except to recognize, as did Justice O'Connor in her dissent, that hard cases make bad law. 502 U.S. at 207. The majority's particularly heavy emphasis on stare decisis is perhaps the only way to explain the case. It certainly seems contrary to the holding in *Will v. Michigan Dep't. of State Police*, 491 U.S. 58 (1989) which basically held that if you can't sue a state or state official in a § 1983 claim in federal court, you can't do so in state court either. *Hilton* itself emphasizes that it is a case of pure statutory interpretation, not constitutional interpretation. Whether *Hilton* remains good law after *Seminole* is questionable. *Hilton* claims to recognize the "federalism-related concerns that arise when the National Government uses the state courts as the exclusive forum to permit recovery under a congressional statute." Writing for the majority, Justice Kennedy stated that it was desirable to have a symmetry which makes a state's liability or immunity the same in both state and federal courts, but that symmetry could not override expectations that had been built upon stare decisis.

state employees against Ohio on Eleventh Amendment grounds and stated: "[S]tate employees may sue in state court for money damages under the FLSA, and a state court would be obligated by the Supremacy Clause to enforce federal law." See also *Aaron v. State of Kansas*, — F.3d —, No. 96-3095 (10th Cir., June 17, 1997). The Tenth Circuit cites to Justice Marshall's concurring opinion in *Employees of Dep't. of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 298 (1973), in which he stated that state courts have an independent constitutional obligation to enforce employees' rights under FLSA. While dicta from the federal courts cannot be ignored, it cannot be considered controlling particularly when the courts did not analyze the precise issue.

The Supremacy Clause argument would be persuasive but for the fact that it can only be applicable where the federal legislation is authorized. We now know that Congress does not have the power to abrogate Eleventh Amendment immunity, except when acting pursuant to the Fourteenth Amendment, and FLSA was not enacted under the Fourteenth Amendment. *Mills*, No. 96-1973, 1997 WL 361186. Thus, Congress did not have the power to abrogate Eleventh Amendment immunity in FLSA. Because Congress did not have the power under the Commerce Clause to abrogate Eleventh Amendment immunity and because state sovereign immunity is synonymous with Eleventh Amendment immunity, Congress did not have the power to abrogate the immunity of states to be sued for damages in their own courts, without their consent.⁷ Therefore, the Supremacy Clause does not come into play.

This court concludes that the Maine cases compel a ruling in this action that the plaintiffs are barred by the

⁷ A state trial court in Wisconsin has come to the same conclusion in a FLSA action against a state agency. *German v. Wisconsin Dep't of Transp.*, Docket No. 96-DV-1261, (Circuit Court, Branch 2, March 11, 1997).

doctrine of sovereign immunity from collecting damages from Maine in this case. There being no claim for which relief can be granted, judgment must be granted for the State of Maine.

ORDER and JUDGMENT

The motion of the defendant State of Maine for judgment on the pleadings is granted. Judgment is granted to the defendant State of Maine.

/s/ Susan Calkins
SUSAN CALKINS
Superior Court Justice

Dated: July 18, 1997

OCT 9 1998

OFFICE OF THE CLERK

(2)
No. 98-436

In The
Supreme Court of the United States
October Term, 1998

JOHN ALDEN, *et al.*,

Petitioners,

v.

STATE OF MAINE,

Respondent.

On Petition For A Writ Of Certiorari
To The Maine Supreme Judicial Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Notwithstanding the tenth amendment, the eleventh amendment, and the general principles of State sovereign immunity, does Congress have the power under the Commerce Clause to abrogate State sovereign immunity in state court when it lacks the power to abrogate such State sovereign immunity in federal court?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, State of Maine ("Maine"), respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the decision and judgment of the Maine Supreme Judicial Court, sitting as the Law Court ("Law Court"), issued on August 4, 1998, reproduced in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at Pet. App. 1a-13a, and reported in *Alden v. State*, 715 A.2d 172 (Me. 1998).

STATEMENT OF THE CASE

The present case, which comes to the Court from the Maine Supreme Judicial Court, is substantially the same as an earlier case that was brought in the United States District Court and was dismissed following *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

Federal Court Suit. On December 21, 1992, the petitioners, 72 current and former probation officers, along with 24 other probation officers, filed suit in United States District Court against Maine, alleging that Maine had not properly paid them overtime pursuant to section 7 of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 207. Maine considered the petitioners professionals exempt under the FLSA, and, pursuant to a collective bargaining agreement, paid them a 16% non-standard premium in lieu of overtime. In addition to disputing the petitioners' claims, Maine asserted affirmative defenses based, *inter alia*, on sovereign immunity, the tenth amendment, and the eleventh amendment.

Subsequently, the District Court held that the plaintiffs were not entirely exempt from the overtime requirements of the FLSA, but were partially exempt as law enforcement officers. *Mills v. Maine*, 839 F. Supp. 3 (D. Me. 1993). The District Court then determined the method of calculating the overtime owed to the plaintiffs. *Mills v. Maine*, 853 F. Supp. 551 (D. Me. 1994).

Because the petitioners could receive under the collective bargaining agreement either the 16% non-standard premium in lieu of overtime *or* overtime, but not both, following the District Court's decision, beginning on February 6, 1994, Maine began to pay the petitioners overtime, which has continued to this day.¹ Pet. App. 15a-16a. The petitioners do not – and cannot – allege that there is any on-going violation of the FLSA. Thus, this case involves solely a claim for retroactive monetary relief directly against the State, *i.e.*, a claim for back pay for the period from December 21, 1989, to February 6, 1994. Pet. App. 16a.

¹ This case underscores the hazards of attempting to shoehorn the traditional and essential functions of government into the rigid requirements of statutes such as the FLSA that were enacted to regulate private enterprise. Because the petitioners do not work very much overtime, most of the petitioners earned less money when Maine began paying them overtime instead of the 16% non-standard premium in lieu of overtime. The petitioners then sued Maine and five state officials for retaliation under section 15(a)(3) of the FLSA, 29 U.S.C. § 215(a)(3). This claim was rejected by the District Court and by the First Circuit. *Blackie v. Maine*, 888 F. Supp. 203 (D. Me. 1995), *aff'd*, 75 F.3d 716 (1st Cir. 1996). Thus, even if their damage claims had not been barred, the petitioners would have achieved, at best, a Pyrrhic victory in this litigation.

Meanwhile, Maine proposed to calculate the overtime based on the attested time records the plaintiffs signed and submitted each week (reserving its appeal rights on the underlying liability decision). Virtually all of the petitioners chose to contest the accuracy of their time records, and the District Court appointed a special master to calculate the overtime. Following extensive proceedings, the special master issued tentative rulings, largely rejecting the petitioners' claims.

While the parties' objections to the special master's report were pending, this Court decided *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Based on that decision, Maine moved to dismiss the federal lawsuit for lack of subject matter jurisdiction on sovereign immunity grounds. The District Court dismissed the suit, which was affirmed on appeal by the First Circuit. *Mills v. Maine*, 1996 WL 400510 (D. Me. July 3, 1996), *aff'd*, 118 F.3d 37 (1st Cir. 1997). The petitioners did not seek review of that decision in this Court, and thus the petitioners concede that Congress lacked the authority to abrogate State sovereign immunity in federal court pursuant to the eleventh amendment when it exercised its powers under the Commerce Clause to enact the Fair Labor Standards Act.

State Court Suit. Following dismissal of their federal court suit, on July 31, 1996, the petitioners filed the present suit against Maine in the Maine Superior Court, seeking damages for past alleged FLSA violations. Once again, in addition to disputing the petitioners' claims on the merits, Maine asserted an affirmative defense based on sovereign immunity. *See* Appendix to Appellants' Brief at A21. The petitioners sought to strike this defense, and

Maine sought judgment on the pleadings.² On July 18, 1997, the Superior Court granted judgment on the pleadings to Maine. Pet. App. 14a-24a.

Simply put, if a plaintiff can't seek damages against the state for violations of federal law in federal court, the plaintiff can't seek damages in state court either.

Pet. App. 20a.

The petitioners then appealed to the Law Court. Over a dissent, on August 4, 1998, the Law Court affirmed dismissal of the petitioners' claims. Pet. App. 1a-13a. The court rejected the anomalous result advocated by the petitioners, namely, that the only forum for enforcement of a federal statute was state court:

The postulate at work here, state sovereign immunity, is a "background principle" that is "embodied in the Eleventh Amendment." [*Seminole Tribe v. Florida*,] 517 U.S. at 72. Thus, the Eleventh Amendment does not delimit the scope and effect of state sovereign immunity. Rather, it reflects but one aspect of the states' inherent, more sweeping immunity from suits brought by private parties. A power so basic and profound would be an odd power indeed if it protected the states from suit in federal courts but provided no comparable protection in their own

² The parties also litigated Maine's affirmative defense based on the statute of limitations. As noted above, there were no on-going alleged FLSA violations, and the petitioners were only seeking damages for alleged violations that had occurred over two years before the state court suit was filed. The Superior Court rejected this defense, Pet. App. 16a-18a, and Maine did not pursue this issue on appeal.

courts. If Congress does not have the power to abrogate state sovereign immunity with respect to federal causes of action brought in federal courts, as the *Seminole Tribe* case clearly held, then that limitation on congressional power may not be circumvented simply by moving to a state court. Accordingly, we conclude that sovereign immunity protects the State from defending this federal cause of action in its own courts.

Pet. App. 6a. In so holding, the Law Court relied on numerous prior decisions in which it had construed State sovereign immunity as congruent with eleventh amendment immunity. See Pet. App. 3a-4a (collecting cases). The Law Court also rejected the petitioners' new argument on appeal that Maine had waived its sovereign immunity based on its conclusion that the Maine Legislature had enacted statutes that expressly exempt the State from overtime suits. Pet. App. 6a-7a (citing Me. Rev. Stat. Ann., tit. 26, §§ 663(10), 664(3) (1988 & Supp. 1997)).

REASONS FOR DENYING THE WRIT

I. THE COURT SHOULD DENY THE WRIT TO REVIEW THE SOVEREIGN IMMUNITY CLAIM SO THAT THIS ISSUE CAN PERCOLATE IN THE STATE COURTS.

The petitioners' principal argument is that the Court should resolve the issue whether Congress has the power to abrogate State sovereign immunity in state court in cases in which Congress lacks the power to abrogate such State sovereign immunity in federal court because there is an intolerable conflict in the lower courts. See *Petition*

for a Writ of Certiorari ("Petition") at 5-14. The Court, however, should deny the writ because the petitioners have overstated the conflict and understated the complexity of the issue. See, e.g., *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J., respecting denial of certiorari) ("Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from such further study.").

The petitioners contend that the Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), has created a "wave of litigation," see Petition at 7, thereby suggesting that it is a new issue whether States which are immune from suit in federal court under the eleventh amendment are also immune from suit in state court. First, the petitioners have ignored 40 years of constitutional litigation in state court prior to *Seminole Tribe* in which the decision below is simply the latest ripple. Second, the petitioners' "wave of litigation" following *Seminole Tribe* consists of only one state court of last resort, and the Court should defer consideration of this matter until state courts have had an adequate opportunity to consider this complex issue further.

A. The Decision Below Continued A Long Tradition Of Relying Upon Eleventh Amendment Jurisprudence To Determine Whether States That Are Immune In Federal Court Are Also Immune In State Court.

State courts have long relied upon the Court's eleventh amendment jurisprudence to determine whether

States are immune from suit under federal law in state court because "blind reliance upon the text of the Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of.'" *Seminole Tribe*, 517 U.S. at 69 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 326 (1934); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)). Indeed, the eleventh amendment "stand[s] not so much for what it says, but for the presupposition * * * which it confirms." *Seminole Tribe*, 517 U.S. at 54 (ellipsis added by Court) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)) (quoted in decision below, Pet. App. 3a).

That presupposition [of State sovereign immunity], first observed over a century ago in *Hans v. Louisiana*, 134 U.S. 1 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that " '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.' "

Seminole Tribe, 517 U.S. at 54 (emphasis deleted by the Court) (quoting *Hans v. Louisiana*, 134 U.S. at 13; The Federalist No. 81, at 487 (A. Hamilton) (C. Rossiter ed. 1961)) (quoted in decision below, Pet. App. 3a).³

³ Applying these principles, the Court has repeatedly stated that States are generally immune from suit in any court without their consent, and not, as the petitioners suggest, only immune from suit in federal court. See, e.g., *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 321 (1837) ("No sovereign state is liable to be sued without her consent,"); *Beers v. Alabama*, 61 U.S. (20 How.) 527, 529 (1857) ("It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent

Thus, as the principal state court case relied upon by the petitioners recognized, for over 40 years, state courts have generally concluded in a wide variety of contexts that States which are immune from suit in federal court under the eleventh amendment are also immune from such suits in state court. See *Jacoby v. Arkansas Department of Education*, 331 Ark. 508, 962 S.W.2d 773, 777 (1998) (collecting cases from eight states over a 40-year period), petition for cert. filed, 67 U.S.L.W. 3024 (U.S. June 24, 1998) (No. 98-4); see also *Drake v. Smith*, 390 A.2d 541, 542-44 (Me. 1978) (federal welfare laws); *Thiboutot v. State*, 405 A.2d 230, 232-37 (Me. 1979) (federal welfare laws), *aff'd on other grounds*, 448 U.S. 1 (1980); *Jackson v. State*, 544 A.2d

and permission * * *"); *Cunningham v. Macon & Brunswick Railroad*, 109 U.S. 446, 451 (1884) ("It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as a defendant in any court in this country without their consent * * *"); *Hans v. Louisiana*, 134 U.S. at 16 ("The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted."); *Ex parte New York*, 256 U.S. 490, 497 (1921) (eleventh amendment is "but an exemplification" of the fundamental rule of sovereign immunity that "a State cannot be sued without its consent"); *Monaco v. Mississippi*, 292 U.S. at 322-23 ("Behind the words of the constitutional provisions are postulates which limit and control. * * * There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention.") (citation and footnote omitted). In short, "[f]or over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment." *Seminole Tribe*, 517 U.S. at 67.

291, 298-99 (Me. 1988) (Rehabilitation Act), *cert. denied*, 491 U.S. 904 (1989); *Moody v. Commissioner, Department of Human Services*, 661 A.2d 156, 158-59 (Me. 1995) (federal welfare laws).⁴ "This point of view is perhaps best typified" by the analysis of the Massachusetts Supreme Judicial Court. *Jacoby*, 962 S.W.2d at 777.

The only logical interpretation of this implicit constitutional principle [that States would retain their sovereign immunity] is that it must apply regardless of the court in which the State is being sued. Any conclusion to the contrary would decimate the force of the Eleventh Amendment and demote it into nothing more than a choice of forum clause: either the State must consent to be sued in Federal court or it will be unwillingly subjected to process in its own courts. We think that the Supreme Court's Eleventh Amendment jurisprudence demonstrates a greater respect for the principle of State sovereign immunity.

Although concerns for Federal-State comity – the unseemly notion of one sovereign being hauled into the courts of another – arise in many Eleventh Amendment cases, those federalism concerns are no less present in this type of case. Although here it is not a question of a State being hauled into the courts of another sovereign, it is a question of a State being hauled into its own courts by the laws of another sovereign. Moreover, those laws are alleged to require the

⁴ Cf. also *State Department of Highways v. Dopyera*, 834 S.W.2d 50, 58 (Tex.) (federal maritime law), *cert. denied*, 506 U.S. 1014 (1992); *Ortega v. Port of Portland*, 147 Or. App. 489, 493-98, 936 P.2d 1037, 1039-42 (1997) (federal maritime law).

payment of retroactive damage awards out of a State's coffers. If there is any area of State sovereignty which the Supreme Court is particularly hesitant to invade, it is State citizens' settled decisions about State budgetary allocations.

Morris v. Massachusetts Maritime Academy, 409 Mass. 179, 185, 565 N.E.2d 422, 426 (1991) (emphasis in original, brackets added, and citations omitted).

Indeed, state courts long ago even addressed the specific issue whether individuals could sue for past FLSA overtime in state court when they could not sue for such overtime in federal court. Although Congress expanded the coverage of the FLSA in 1966 to include for the first time some public employers, the Court subsequently held that Congress had not expressly abrogated the States' eleventh amendment immunity in the FLSA from private suits brought in federal court. *Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279 (1973). Until Congress overturned this decision by making States expressly subject to suit under the FLSA (which, in turn, has largely been invalidated vis-à-vis States in cases such as *Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997)), state courts addressed claims for past FLSA overtime during the period in the mid-1970's when such claims for past overtime could not be brought in federal court. The better reasoned decisions concluded that, since States were immune from FLSA damages actions in federal court under the eleventh amendment, they were also immune from such actions in state court. See *Mossman v. Donahey*, 46 Ohio St. 2d 1, 346 N.E.2d 305, 308-15 (1976) (cited in Pet. App. 21a); *Weppeler v. Dade County School Board*, 311 So. 2d 409, 410 (Fla. App. 1975); contra *Clover*

Bottom Hospital & School v. Townsend, 513 S.W.2d 505 (Tenn. 1974). For present purposes, it is sufficient to note that even the asserted conflict concerning the FLSA has not previously proven intolerable.

Thus, there is nothing unusual or radical about the conclusion of the court below – the Law Court was simply continuing a long tradition of state courts relying upon the Court's eleventh amendment jurisprudence to determine whether States that are immune in federal court are also immune from suit in state court. In the last 40 years, the Court has not yet found it necessary to review that symmetrically sound conclusion.

B. The Decision Below Did Not Create An Intolerable Conflict Of An Emerging Issue Following *Seminole Tribe*.

The petitioners suggest that the Court should grant plenary review now because *Seminole Tribe* constitutes a sea change in eleventh amendment and State sovereign immunity jurisprudence, thus spawning "a myriad of like pending cases * * * with the same inevitability as the night follows the day." Petition at 5. This asserted conflict consists, however, of only one state court of last resort, *Jacoby v. Arkansas Department of Education*, 331 Ark. 508, 962 S.W.2d 773, 777 (1998), petition for cert. filed, 67 U.S.L.W. 3024 (U.S. June 24, 1998) (No. 98-4), and various lower courts. In light of the complexity of the issues and the likelihood of further illumination by other state courts, this is not an intolerable conflict. Under these circumstances, to argue that *Seminole Tribe* constitutes a

watershed event which has resulted in numerous conflicting lower court decisions is to seize the sword by the blade.

Following the unanimous conclusion by federal courts that under *Seminole Tribe*, individuals cannot pursue FLSA damage actions in federal court, *see, e.g., Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997), a number of lower state courts have addressed the issue of whether individuals can pursue FLSA actions in state court.⁵ That actually militates against review in this Court at this time. "One factor that affects the exercise of our discretionary jurisdiction is a desire to let some complex and significant issues be considered by several courts before granting certiorari." *Colorado Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913, 918 (1976) (Brennan, J., dissenting from denial of certiorari). Caution is particularly appropriate if, as the petitioners contend, the "questions presented here are sensitive, difficult and important." Petition at 9.

In evaluating the alleged conflict, it is important to recognize that, following *Seminole Tribe*, only two state courts of last resort have addressed the issue whether

⁵ Although the petitioners note that some lower federal courts have suggested in *dicta* that individuals could pursue their FLSA actions in state court, *see* Petition at 13 n.8, they wisely do not claim that the Court must resolve the conflict between the holding below and this gratuitous *dicta*. In any event, these offhand comments are not the product of any careful thought or research. *See Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996) (no authority cited), *amended on petition for rehearing*, 107 F.3d 358 (6th Cir. 1997); *Aaron v. Kansas*, 115 F.3d 813, 817 (10th Cir. 1997) (one opinion concurring in the judgment cited).

Congress has the power to abrogate State sovereign immunity in state court under the FLSA when it lacks the power to do so in federal court – the Maine Supreme Judicial Court and the Arkansas Supreme Court. The other decisions are generally unreported trial court and intermediate appellate court decisions that contain scant analysis, and are currently on appeal, or are subject to further review by their respective State Supreme Courts, and ultimately by this Court.⁶

Under these circumstances, the Court should not feel compelled to address this issue today. *See Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 407 (1995) (O'Connor, J., dissenting) ("Even when the lower courts are in clear conflict, we often defer consideration of novel

⁶ The petitioners' list of lower court decisions is incomplete. Sovereign immunity defenses were sustained in the following FLSA cases: *Triplett v. Iowa State University*, No. CV 37547 (Iowa Dist. Ct. March 11, 1998); *Kuehl v. New Mexico Department of Public Safety*, No. SF 97-668(C) (N.M. Dist. Ct. Feb. 25, 1998); *Allen v. Fauver*, No. ESX-L-3302-94 (N.J. Super. Ct. Feb. 17, 1998); *German v. Department of Transportation*, No. 96-CV-1261 (Wis. Cir. Ct. March 8, 1997); *cf. Keller v. Dailey*, No. 97APE05-658 (Ohio App. Dec. 19, 1997) (trial court lacks jurisdiction; Court of Claims has jurisdiction over FLSA claims). Sovereign immunity defenses were rejected in the following FLSA cases: *Whittington v. State Department of Public Safety*, No. 19,065 (N.M. App. Sept. 3, 1998); *Ahern v. State*, 676 N.Y.S.2d 232 (App. Div. 1998); *Bunch v. Robinson*, 122 Md. App. 437, 712 A.2d 585 (1998); *Chambers v. Board of Regents of University of Wisconsin System*, No. 98-CV-0763 (Wis. Cir. Ct. July 16, 1998); *Hartman v. Regents of University of Colorado*, No. 96 CV 1136 (Colo. Dist. Ct. July 9, 1998); *Ribitzki v. School Board of Highlands County*, 710 So. 2d 226 (Fla. App. 1998); *Raper v. State*, No. CL 68918 (Iowa Dist. Ct. Oct. 23, 1997).

questions of law to permit further development."). "The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result." *Id.* at 408 (O'Connor, J., dissenting) (quoting Stevens, *Some Thoughts on Judicial Restraint*, 66 *Judicature* 177, 183 (1982)).

This is particularly true in this case since most of the lower courts have not explored the salient issues in any depth. For example, the Arkansas Supreme Court in *Jacoby* was not assisted by the trial court's one page decision sustaining the State's sovereign immunity defense that contained no analysis.⁷ Even in cases in which the underlying issue is important, "the likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals to serve as laboratories in which the issue receives further study before it is addressed by this Court." *Brown v. Texas*, 118 S. Ct. 355, 357 (1997)

⁷ The *Jacoby* court also contended that the State "fail[ed] to mention, much less discuss" the employees' "pivotal authority," *Hilton v. South Carolina Public Railways*, 502 U.S. 197 (1991). See *Jacoby*, 962 S.W.2d at 776 n.1. The *Jacoby* court's reliance on *Hilton* is misguided because the issue there was not Congress' power to abrogate state sovereign immunity, but rather Congress' intention to create a cause of action under the Federal Employees' Liability Act ("FELA") against a state-owned railroad, which, in turn, could be enforced in state court. See *Hilton*, 502 U.S. at 199. The Court had previously assumed that Congress did have the power under the Commerce Clause to abrogate state sovereign immunity in FELA. See *Welch v. Texas Department of Highways*, 483 U.S. 468, 475, 478 n.8 (1987) (plurality opinion). Following *Seminole Tribe*, this assumption is, of course, unfounded since the Court made plain that proper abrogation depends upon both Congress' intent and Congress' power. *Seminole Tribe*, 517 U.S. at 55.

(Stevens, J., respecting denial of certiorari) (quotation omitted).

Furthermore, "[i]t may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1945) (Frankfurter, J., respecting denial of certiorari). In this case, the Court would benefit from further exploration by the lower courts of the entire scope of State sovereign immunity, not only as "exemplif[ied]" in the eleventh amendment, see *Ex parte New York*, 256 U.S. at 497, but as further illumined in the tenth amendment.

Although the Law Court did not find it necessary to consider the Court's tenth amendment jurisprudence, we relied upon that jurisprudence in the courts below to reinforce the conclusion that Congress lacks the authority to abrogate State sovereign immunity in state court when it acts pursuant to its Commerce Clause powers. See Appellee's Brief at 24, 32-34; cf. *Bennett v. Spear*, 117 S. Ct. 1154, 1163 (1997) (respondent may defend the judgment on any ground supported by the record). For example, that jurisprudence provides an easy and complete answer to the petitioners' claim that Maine is seeking "an exception to the Supremacy Clause that saves out the state law of sovereign immunity from the otherwise overriding force of a federal statute enacted by Congress pursuant to its enumerated powers." Petition at 8.

The Supremacy Clause, however, makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]"; so the Supremacy Clause merely brings us back to the question discussed earlier,

whether laws conscripting state officers violate state sovereign immunity and are thus not in accord with the Constitution.

Printz v. United States, 117 S. Ct. 2365, 2379 (1997) (brackets added by Court) (quoted in Appellee's Brief at 33-34).

In other words, the issue is not whether Congress had the *intention* to subject States to private FLSA damage actions in state and federal court – it most certainly did, see 29 U.S.C. § 216(b) – but rather whether Congress had the *power* to do so. In *Seminole Tribe*, the Court concluded that States did not surrender their immunity in the plan of the convention when they granted complete law-making authority to Congress under the Commerce Clause. See *Seminole Tribe*, 517 U.S. at 72-73. This conclusion is equally sound in state court when coupled with the backstop of the tenth amendment, in which “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend X.

In short, we believe that Congress, when acting pursuant to its Commerce Clause powers, lacks the power under the tenth amendment to abrogate Maine's sovereign immunity against FLSA damage claims in state court:

In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority under the

Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

New York v. United States, 505 U.S. 144, 166 (1992) (citations omitted) (quoted in Appellee's Brief at 32 and quoted in part in *Printz v. United States*, 117 S. Ct. at 2379). Thus, when a law enacted for carrying into execution the Commerce Clause violates the principle of State sovereign immunity, it is “in the words of *The Federalist*, ‘merely [an] ac[t] of usurpation’ which ‘deserve[s] to be treated as such.’ ” *Printz v. United States*, 117 S. Ct. at 2379 (quoting *The Federalist* No. 33, at 204 (A. Hamilton) (C. Rossiter ed. 1961)) (brackets in original).

Neither the Law Court nor the *Jacoby* court considered the Court's tenth amendment jurisprudence.⁸ Even accepting *arguendo* the petitioners' contention that the “questions presented here are sensitive, difficult and important,” Petition at 9, we believe that it would be appropriate to allow all aspects of this constitutional issue, including the tenth amendment, the eleventh

⁸ If and when the Court addresses the issue whether unconsenting States can be subjected to FLSA damages actions in state court in light of the tenth amendment, a more fundamental question that could, and perhaps should, be considered is whether States can properly be subjected to the requirements of the FLSA, i.e., whether *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), should be reconsidered.

amendment, and the general "background principle of state sovereign immunity," *Seminole Tribe*, 517 U.S. at 72, to percolate further in the state courts.

The petitioners' protestations notwithstanding, *see* Petition at 14 ("[t]hese jurisdictional papers are neither the time nor the place to plumb" the merits of the issues presented), the petitioners' fundamental argument is that the Court should review the decision below because it is dangerously wrong. *Cf.* Petition at 9 (decision "denies Congress all authority * * *") (emphasis in original); *id.* (decision renders portions of the FLSA a "dead letter"). We strongly disagree. In response to the question posed by *Seminole Tribe* – what is the source of Congress' power to abrogate State sovereign immunity? – the petitioners offer no response.

In a similar vein, the petitioners argue that the Court should review this case because the decision below denies significant authority to Congress to pass legislation pursuant to its Article I powers that is enforceable by private parties. *See* Petition at 9. This is simply a variation on the argument that States will ignore applicable federal law if Congress does not have authority to abrogate State sovereign immunity, which the Court not only rejected, but rejected in terms that demonstrate why the Law Court properly decided this case:

This argument wholly disregards other methods of ensuring the States' compliance with federal law: The Federal Government can bring suit in federal court against a State; an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law; and *this Court is*

empowered to review a question of federal law arising from a state-court decision where a State has consented to suit.

Seminole Tribe, 517 U.S. at 71 n.14 (citations omitted and emphasis added); *see also Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994) (eleventh amendment bars suit in federal court, "leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals"). In sum, there is no compelling reason at this time to review this decision.

II. THE COURT SHOULD DENY THE WRIT TO REVIEW THE PETITIONERS' PROCEDURALLY BARRED DISCRIMINATION CLAIM.

The petitioners contend that this Court should review the decision below because the Law Court sanctioned discrimination against a federal cause of action, namely, an FLSA damages action. *See* Petition at 14-17. Since the Law Court did not address this claim, and since the petitioners did not properly present this issue in state court, the Court should not consider this matter.

With very rare exceptions, * * * we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams v. Robertson, 117 S. Ct. 1028, 1029 (1997) (*per curiam*) (citations omitted) (dismissing writ as improvidently granted).

Before this claim disappears into procedural quicksand, it is important to recognize the limited nature of the

petitioners' claim. The petitioners do not – nor could they – contend that this aspect of the decision below conflicts with *Jacoby* or any other lower court decision. Indeed, we are not aware of any FLSA case addressing a similar discrimination claim. Rather, the petitioners contend that the Court should review the decision below because it is simply wrong. "It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice*, § 4.17 at 193 (7th ed. 1993) (footnote omitted).

Although the Law Court expressly rejected the petitioners' claim that Maine had waived its sovereign immunity by enacting state statutes that permit state employees to sue the State in certain circumstances, *see* Pet. App. 6a-7a, one will search in vain in the Law Court's opinion for any discussion of the petitioners' federal discrimination claim. *See* Pet. App. 1a-13a.

When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question that is sought to be presented here.

Adams v. Robertson, 117 S. Ct. at 1029 (citations omitted).

The petitioners did not raise any aspect of this issue in the trial court. *See* Appendix to Appellants' Brief at A34-A36. The petitioners contended on appeal to the Law Court that Maine had waived its sovereign immunity by statutorily opening its courts to numerous other state law

claims, and, therefore, that refusing to hear the petitioners' FLSA claim also constituted illegal discrimination. In addition to dispatching the arguments on the merits, Maine responded that the petitioners' new arguments on appeal were procedurally barred under well-established Maine precedent. *See* Appellee's Brief at 7-10, 31-34 (collecting cases).⁹

The Law Court did not address the procedural barrier, presumably because the premise of both the petitioners' waiver argument (which the Law Court addressed) and the discrimination argument (which the Law Court did not address) was so plainly insubstantial. The petitioners contend that state courts must entertain the petitioners' FLSA claims because Maine has "enacted several statutes whereby the State has made itself amenable to suit in the area of state employee wage claims." Pet. App. 6a; *see also* Petition at 4 n.3 (citing statutes under which allegedly "the State is subject to suit by its employees"). The Law Court concluded, however, as a matter of Maine law, that Me. Rev. Stat. Ann., tit. 26, § 664(3) (Supp. 1997), "is the only statutory provision directly relevant to the central issue on appeal – the State's amenability to suit by state employees for overtime pay." Pet. App. 6a. This conclusion doomed the petitioners' claim because section 664(3) provides that "[t]he overtime provision of this section does not apply to

⁹ *See, e.g., Cyr v. Cyr*, 432 A.2d 793, 797 (Me. 1981) ("No principle is better settled than that a party who raises an issue for the first time on appeal will be deemed to have waived the issue, even if the issue is one of constitutional law.") (citations omitted).

public employees," *id.*, who are defined as "any person[s] whose wages are paid by * * * the State." Me. Rev. Stat. Ann., tit. 26, § 663(10) (1988); see Pet. App. 6a-7a.

Although the petitioners challenge this interpretation of Maine law, see Petition at 3 n.4, 15, this Court obviously does not review that conclusion. "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state." *Johnson v. Fankell*, 117 S. Ct. 1800, 1804 (1997) (citations omitted). In any event, the petitioners present an extremely narrow question unworthy of this Court's review – whether Maine, in fact, has enacted "analogous state statutory private party actions" that should enable the petitioners to pursue their FLSA claims in state court.¹⁰ See Petition at 15.

Moreover, Maine is not discriminating against a federal cause of action. Maine has "not selectively favor[ed] state causes of action – or selectively disfavor[ed] federal

¹⁰ The petitioners' argument is also at cross-purposes with this Court's eleventh amendment jurisprudence in which "analogous" state statutes are insufficient to result in a waiver of State sovereign immunity. "In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room, for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (brackets in original and quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). The petitioners fail to appreciate that one of the fundamental attributes of State sovereign immunity is the sovereign's power to determine under what circumstances it will, and will not, consent to suit.

causes of action – in state court[.]" Petition at 16. The principal case relied upon by the petitioners, *Mondou v. New York*, 223 U.S. 1 (1912) (the "*Second Employers' Liability Case*") (cited in Petition at 16), stands for the unremarkable "proposition that a state court must entertain a claim arising under federal law 'when its ordinary jurisdiction as prescribed by local law is appropriate to the occasion and is invoked in conformity with those laws.'" *Printz v. United States*, 117 S. Ct. 2365, 2370 n.1 (1997) (quoting *Second Employers' Liability Case*, 223 U.S. at 56-57) (emphasis added). Since over 20 years of decisions from the Law Court demonstrate that Maine's ordinary jurisdiction does not permit the State to be subjected to damages action in state court if it is immune in federal court, see Pet. App. 3a-4a (citing cases), and since Maine statutes expressly exempt the State from overtime suits, see Pet. App. 6a-7a (citing statutes), Maine is not discriminating against a federal cause of action.¹¹

The fundamental premise of *Testa v. Katt*, 330 U.S. 386 (1947) (cited in Petition at 16-17), and its progeny, is that "state courts cannot refuse to apply federal law[.]" *Printz v. United States*, 117 S. Ct. at 2381. This, however, does not advance the petitioners' cause since federal law in the

¹¹ The petitioners' reliance on *Howlett v. Rose*, 496 U.S. 356 (1990) (cited in Petition at 15), is also misplaced, since the issue in that case was "whether a state-law defense of 'sovereign immunity' is available to a school board otherwise subject to suit in a Florida court even though such a defense would not be available if the action had been brought in a federal forum." 496 U.S. at 359. The issue here is precisely the opposite – should the State have available a defense in state court that was available when the action was brought in the federal forum?

form of *Seminole Tribe* precludes FLSA damages claim against States in either federal or state court. As the Law Court properly determined, if Congress lacks the authority to abrogate State sovereign immunity in federal court, then Congress lacks the authority to abrogate State sovereign immunity in state court. In sum, the Court should not review the petitioners' discrimination claim that is not only procedurally, but substantively, bankrupt.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

October 9, 1998

Respectfully submitted,

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3

No. 98-436

FIL

OCT 19 1998

IN THE
Supreme Court of the United States

OFFICE OF THE CLERK
SUPREME COURT, U.S.

OCTOBER TERM, 1998

JOHN H. ALDEN, *et al.*,
v. *Petitioners,*
STATE OF MAINE,
Respondent.

On Petition for a Writ of Certiorari to the
Maine Supreme Judicial Court

REPLY BRIEF FOR PETITIONERS

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6 pp

REPLY BRIEF FOR PETITIONERS

I.

1. The respondent, State of Maine, accepts all of the following: that the instant case and *Arkansas Department of Education v. Jacoby, et al.* (No. 98-04) (pending on petition for a writ of *certiorari*) arise out of the same factual and legal context: that the Maine Supreme Judicial Court's decision here and the Arkansas Supreme Court's *Jacoby* decision are in direct conflict on the Article I legislative powers/state sovereign immunity question presented in the *certiorari* petition here (as Question 1) and in the State of Arkansas' petition in *Jacoby*; and that this sensitive and important federalism question—which has taken on added importance as a result of this Court's *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) decision—is a recurring one that has long been the subject of conflicting views.

All that being so, as the brief in opposition recognizes, the State of Maine, as respondent, has only one card to play: that this petition (and by logical extension the State of Arkansas' petition in *Jacoby*) should be denied so that the question presented may be “illuminated” by further state court proceedings—*viz.* remain uncertain and unresolved for the indefinite future. Br. in Opp. 11-15.

It is telling that the State of Arkansas does not share the State of Maine's position in this regard. And, on analysis, it is difficult to conceive of a case in which the “illumination” argument against review in this Court is less apposite. The facts are not in dispute. The recurring legal issue presented has been well-defined by conflicting decisions and disagreements in debate over time.¹ And,

¹ Indeed, unable to leave any rhetorical stone unturned, respondent both argues that this legal controversy is not ripe for review and taxes us with failing to fully develop the pre-*Seminole* state court decisional law in our petition and with failing to list every post-*Seminole* lower state court decision. Br. n Opp. 8-9, 13 n.6. The brief in opposition then adds to our showing in those two re-

that issue is squarely and directly presented by the conflicting decisions of the Maine Court and the Arkansas Court. There is simply nothing to be gained in the interest of informed and reasoned decisionmaking in this Court that justifies a period of additional litigation in the state courts without any authoritative guidance.

2. As we noted in our petition, these jurisdictional papers do not present the proper occasion for a full-dress consideration of the questions presented here on the merits—that occasion is the briefs on the merits and the oral argument. Given respondent's presentation, however, we do think it appropriate to meet the brief in opposition on three of its points.

a. The brief in opposition (at pp. 6-10) attempts to create the impression that the Eleventh Amendment, and this Court's Eleventh Amendment cases upholding state sovereign immunity in the federal courts, govern here. But this Court has affirmed, and reaffirmed, that the Eleventh Amendment does *not* apply to state court proceedings and thus does *not* provide the State an immunity from suit in the state courts. See Pet. 6, 8-11 (collecting cases).

b. The brief in opposition (at p. 7 n.3) marshalls a set of quotations from the Court's Eleventh Amendment cases in order to suggest that the Court has recognized a general state immunity in private-party state-court federal-law cases absent the State's consent. Those quotations—each of which is taken out of context—do not support that broad proposition. Indeed, the square contrary holding of *Nevada v. Hall*, 440 U.S. 410 (1979), belies respondent's submission in this regard.

c. The brief in opposition's reliance (at pp. 15-17) on *Printz v. United States*, 117 S. Ct. 2365 (1997) and its predecessor "commandeering" Tenth Amendment cases is wholly misplaced. In *Printz*, and in its predecessors, this

gards, *id.*, thereby giving added weight to our submission that this matter is ripe for review.

Court was at pains to distinguish between the situations there at hand and the special role and responsibility of the state courts under the Supremacy Clause in the enforcement of federal law. See, e.g., 117 S. Ct. at 2370-2371, 2381.

II.

Respondent's argument (Br. in Opp. 19-22) that the *certiorari* petition's second question presented—whether Maine can close its courts to employee *federal* statutory wage claims against the State where analogous *state* statutory claims are justiciable—was not considered by the Maine Supreme Judicial Court flies in the face of the record and the Maine Court's decision.

The discrimination argument was fully presented; indeed one of the "issues presented for review" to the Maine Court was whether "the Supremacy Clause of the United States Constitution [is] violated when a state court bars a federal FLSA action against the state for overtime pay while simultaneously permitting similar suits based on state law." Appellants Br. at 3. And, a full seven pages of our principal brief to the Maine Court was in support of the contention that "the state may not discriminate against federal causes of action." Appellants Br. at 14-21. Eight pages of our reply brief, in turn, were in support of the argument that "the Supremacy Clause prohibits discrimination by a state court against federal causes of action that are analogous to justiciable state cases." Appellants Reply Br. at 4-13.

The Maine Court, moreover, never even suggested that the discrimination argument was not properly presented. To the contrary, the court below confronted the argument directly (though choosing to misphrase our discrimination contention as one of "waiver") and in so doing, rejected our position on the merits (and not on any of the procedural grounds tendered by the State of Maine). The Maine Court's ruling, set out in the last section of its opinion (dealing with our "alternative" argument), was that Maine state law does not create a cause of action against the State on the *particular* matter in controversy

(overtime pay) and thus that there was no "waiver" (*viz.*, no discrimination). See Pet. App. 6a-7a.

Contrary to respondent (Br. in Opp. 22), this question—what constitutes discrimination against a federal claim—is decidedly *not* a question of state law. Indeed, the state law here is not in dispute. The question, as in *Howlett v. Rose*, 496 U.S. 356 (1990), is whether, as a matter of federal law, the State is treating federal law claimants in a manner less favorable than the State treats comparable state law claimants. In other words, the issue of whether the lack of a Maine state law "overtime remedy" demonstrates no discrimination against federal law overtime claims—given the availability of other actionable state law claims against the State for wages owing—is in itself a *federal* issue.

The brief in opposition's attempt (at p. 23 n.11) to push *Howlett v. Rose* to one side is misleading. *Howlett* is devoted in substantial part to a detailed elaboration of the State's discrimination against federal (as opposed to state) claims in its courts. 496 U.S. at 378-380. And, *Howlett* made plain that where state courts "entertain[] state common law and statutory claims against state entities in a variety of their capacities" the state courts *cannot* reject a federal claim against the State "for substantive policy reasons" grounded in state law. *Id.* at 379-380. Under the Supremacy Clause, "the federal law is law in the state as much as laws passed by the state legislature." *Id.* at 380. *Howlett* is thus very much in point here.

The brief in opposition would also count it against us that on our second question presented, we do not claim a conflict among the lower courts. But we do claim a conflict that is at least as significant: a conflict between the Maine Court's decision and the line of decisions of this Court from *Mondou v. New York*, 223 U.S. 1 (1912), through *Testa v. Katt*, 330 U.S. 386 (1947), and on to *Howlett*.

CONCLUSION

For the reasons stated in the *certiorari* petition and in this reply brief the petition should be granted.

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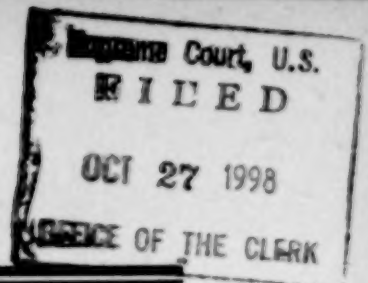
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(4)

No. 98-436



IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JOHN H. ALDEN, *et al.*,
v. *Petitioners,*
STATE OF MAINE,
Respondent.

On Petition for a Writ of Certiorari to the
Maine Supreme Judicial Court

SUPPLEMENTAL BRIEF FOR PETITIONERS

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5/17

SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to Rule 15.8 of the Rules of this Court, John H. Alden *et al.*, the petitioners in this case, file this supplemental brief to call the Court's attention to the Order of the Supreme Court of the State of New Mexico denying the State of New Mexico's *certiorari* petition to that Court in *Stephen R. Whittington, et al. v. State of New Mexico Department of Public Safety, et al.*, N.M. S.Ct. No. 25,364 (October 14, 1998).¹

By that Order the New Mexico Court put the New Mexico law on the First Question presented here—"May a state court refuse to entertain a federal statutory private party cause of action against a State or a state agency—such as [an] employee action against the State . . . under the overtime provisions of the Fair Labor Standards Act. . . —on the basis of state sovereign immunity"—in line with the Arkansas law as declared by the Arkansas Supreme Court in *Jacoby, et al. v. Arkansas Department of Education*, 331 Ark 508, 962 S.W. 2d 773 (1998) pet. for cert. pending *sub. nom. Arkansas Department of Education v. Jacoby, et al.* (No. 98-04), and in conflict with the Maine law as declared by the Maine Supreme Judicial Court in this case.

The decision of the Court of Appeals of the State of New Mexico which became final in that State by reason of the New Mexico Supreme Court's Order is *Whittington, et al. v. State of New Mexico Department of Public Safety, et al.*, Docket No. 19,065 (N.M. Ct. App., September 3, 1998) ("based on the previous decisions by the Supreme Court, we find that the Supremacy Clause requires the district court to enforce the FLSA notwithstanding the

¹ The New Mexico Supreme Court's Order is reprinted as an Appendix hereto.

Department's assertion of state sovereign immunity")
cited Pet. 13 and Br. in Opp. 13, n.6.²

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² We also note that just prior to the New Mexico Supreme Court's Order in the *Whittington* case the State Court of Appeals issued a decision in *Kuehl et al. v. State of New Mexico Department of Public Safety et al.*, Docket No. 19, 313 (N.M. Ct. of App., October 5, 1998), reaffirming its ruling in *Whittington*.

APPENDIX

SA-1

APPENDIX

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Wednesday, October 14, 1998

No. 25,364

STEPHEN R. WHITTINGTON, *et al.*,
Plaintiffs-Respondents,

vs.

STATE OF NEW MEXICO DEPARTMENT OF PUBLIC SAFETY,
DARREN P. WHITE, in his capacity as Secretary of the
New Mexico Department of Public Safety, and FRANK
TAYLOR, in his capacity as the Chief of the New Mex-
ico State Police,

Defendants-Petitioners.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is denied in Court of Appeals number 19065.

16

Supreme Court, U.S.

FILED

JAN 7 1999

OFFICE OF THE CLERK

No. 98-436

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JOHN H. ALDEN, *et al.*,
v. *Petitioners,*
STATE OF MAINE,
Respondent.

On Writ of Certiorari to the
Maine Supreme Judicial Court

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1998

CERTIORARI GRANTED NOVEMBER 9, 1998



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NOTICE

The following items have been omitted in printing this appendix because they appear on the following pages of the printed appendix to the petition for certiorari. They are incorporated herein by reference.

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SUPERIOR COURT
STATE OF MAINE
CUMBERLAND COUNTY

Docket No. CV96-751

JOHN H. ALDEN, *et al.*

vs.

STATE OF MAINE

DOCKET ENTRIES

Date	PROCEEDINGS
1996	
Aug. 01	Received 07-31-96: Complaint filed.
Aug. 30	Received 08-30-96: Plaintiffs' Amended Complaint with Exhibit 1, filed.
Sept. 12	Received 09-12-96: Defendant's Employee's Consent of the Fair Labor Standards Act filed.
Sep. 16	Received 09-16-96: Entry of Appearance of Timothy L. Belcher, Maine State Employees Association, Co-Counsel, Attorneys Donald F. Fontaine and Kaighn Smith, Jr. filed.
Sept. 27	Received 09-27-96: Defendant's Answer filed.
" "	Summons filed. Defendant State of Maine served on 9-20-96.
Oct. 15	Received 10-15-96. Plaintiff's Case File Notice and Pretrial Scheduling Statement filed.
" "	Plaintiff's \$300.00 jury fee paid filed.
Nov. 18	Received 11-15-96. Regular Pretrial List Order filed. (Bradford, J.) Order filed. Case to proceed in accordance with Rule 16(d), M.R.Civ.P. Discov-

Date	PROCEEDINGS
1996	
	ery to be completed by Sept. 30, 1997. Plaintiff to designate expert witnesses by April 11, 1997. Plaintiff to file pretrial memorandum no later than Sept. 30, 1997. By Order to the presiding justice, the Regular Pretrial List Order is incorporated by reference in the docket.
" "	11-18-97 mailed copy to Donald Fontaine and Peter Brann, Esqs.
Dec. 2	Received 12-2-96. Plaintiff's Notification of Discovery Service filed. Plaintiffs' First Set of Interrogatories to Defendant Concerning Defendant's Affirmative Defenses served on Peter J. Brann, Esq. on 11-27-96.
Dec. 13	Received 12-13-96: Plaintiffs' Motion to Amend Complaint with Incorporated Memorandum of Law filed.
" "	Plaintiffs' Request for Hearing filed.
" "	Plaintiffs' Second Amended Complaint with Exhibit A filed.
Dec. 18	Received 12-18-96: Defendant, State of Maine's Answer to Second Amended Complaint filed.
Dec. 18	Received 12-18-96. Order filed. (Calkins, J.) The Plaintiffs' Motion to Amend Complaint is hereby granted. The Plaintiffs' Second Amended Complaint shall govern further proceedings in this matter.
" "	12-18-96 mailed copy to Kaighn Smith and Peter Brann, Esqs. and to Donald F. Fontaine, Esq.
Dec. 23	Received 12-23-96: Plaintiffs' Motion to Dismiss Certain Affirmative Defenses with Incorporated Memorandum of Law with Exhibits A and B filed.
Dec. 23	Received 12-23-96: Plaintiffs' Request for Hearing On Motion to Dismiss Certain Affirmative Defenses filed.

Date	PROCEEDINGS
1997	
Jan. 13	Received 01-13-97: Defendant's Motion for Enlargement of Time filed.
Jan. 16	Received 01/16/97: Plaintiff's Notification of Discovery Service filed. Defendant's response to Plaintiff's interrogatories served on Kaighn Smith on 01/14/97.
Jan. 27	Received 01/27/97: Defendant's second unopposed motion for enlargement of time filed.
Jan. 28	On 01-28-97: As to Defendant's Second Unopposed Motion for Enlargement of Time; Time enlarged by one week for defendant to file opposition to plaintiff's motion to strike. (Calkins, J.) On 01-28-97: Copy mailed to Peter Brann, AAG, Timothy Belcher and Donald Fontaine, Esqs.
Feb. 04	Received 02/03/97: Defendant's Motion for Judgment on the Pleadings filed.
" "	Defendant's Brief in Support of its Motion for Judgment and in Opposition to Plaintiffs' Motion to Strike Affirmative Defenses filed.
Feb. 13	Received 02-12-97: Plaintiffs' Motion for Extension of Time to File Consolidated Opposition to Defendant's Motion for Judgment and Reply to Defendant's Opposition to Plaintiffs' Motion to Strike Affirmative Defenses (Unopposed) filed.
" "	Plaintiffs' Request for Hearing on Motion filed.
Feb. 14	Received 02-13-97. Order filed. (Calkins, J.) Plaintiff's shall have until March 10, 1997, to file their Consolidated to Defendant's Motion for Judgment on the Pleading and Reply to Defendant's Opposition to Plaintiff's Motion to Strike Affirmative Defenses.

Date	PROCEEDINGS
1997	
" "	02-14-97 mailed copies to Kaighn Smith, Timothy Belcher and Peter Brann, Esqs.
Mar. 10	Received 03/10/97: Motion of Cynthia A. Metzler, Acting Secretary of the United States Department of Labor, For Leave to File Brief As Amicus Curiae filed.
" "	Acting Secretary of Labor's Request for Expedited Hearing on Motion filed.
Mar. 11	Received 03/10/97: Plaintiff's Consolidated Opposition to Defendant's Motion for Judgment on the Pleadings and Reply to Defendant's Opposition to Plaintiff's Motion to Dismiss Certain Affirmative Defenses with Exhibit 1 filed.
Mar. 13	Received 03/13/97: Letter from Kaighn Smith Jr. regarding corrections to Plaintiff's Consolidated Opposition to Defendant's Motion for Judgment on the Pleadings and Reply to Defendant's Opposition to Plaintiff's Motion to Dismiss Certain Affirmative Defenses dated 03/10/97 filed.
Mar. 31	Received 03-31-97. Order filed. (Calkins, J.) The motion of United States Dept. of Labor (USDOL) to file a brief as amicus curiae in this matter is hereby GRANTED without opposition. On agreement of all parties, the USDOL shall file its brief as amicus curiae on or before April 7, 1997. The pending motions shall be set for oral argument by the clerk. Pursuant to M.R.CIV.P.79(a), this Order may be incorporated by reference into the docket.
" "	03-31-97 mailed copy to Kaighn Smith, Jr. and Peter Brann, Esqs. and to Timothy L. Belcher, Esq.
" "	Received 03-31-97. Plaintiff's Motion to Amend Complaint with Incorporated Memorandum of Law filed.

Date	PROCEEDINGS
1997	
Mar. 31	Received 03-31-97. Plaintiff's Request for Hearing on Motion to Amend Complaint filed. Plaintiff's Third Amended Complaint filed.
Apr. 1	Received 4-1-97. Order filed. (Calkins, J.) The plaintiffs' motion to amend complaint is hereby granted. The plaintiffs' third amended complaint shall govern further proceedings in this matter. 4-1-97 copy mailed to Donald Fonataine, Timothy Belcher and Peter Brann, Esqs.
Apr. 02	Received 04/02/97: Plaintiff's Motion to Extend Time for Designation of Experts (Unopposed) with attachments filed.
" "	Request for Hearing filed.
Apr. 04	Received 04-04-97. Order filed. (Calkins, J.) The Plaintiffs' Motion for Extension of Time to Designate Experts in this matter is hereby GRANTED. Plaintiffs shall have until on or before June 11, 1997, to designate expert witnesses.
" "	04-04-97 mailed copy to Kaighn Smith, Timothy L. Belcher, Esq. and Peter Brann, AAG.
Apr. 7	Received 4-7-97. Acting Secretary of Labor as Amicus Curiae's Brief filed. (Copy of same filed)
Apr. 29	Received 04-28-97. Defendant's Reply Brief on its Motion for Judgment on the Pleadings filed.
May 13	Received 05-13-97. Defendant, Alixis M. Herman, Secretary of the United States Department of Labor's Motion for Leave to Participate in Oral Argument on Pending Motions filed.
" "	Secretary of Labor's Request for Expedited hearing on Motion filed.

Date	PROCEEDINGS
1997	
May 16	Received 05-16-97. Letter from Kaighn Smith, Jr., Esq. regarding Plaintiff does not oppose to the Motion of Alexis Herman's filed.
May 20	Received 05-19-97. Defendant's Answer to Third Amended Complaint filed.
" "	Defendant's Objection to Secretary's Motion for Leave to Participate in Oral Argument filed.
June 4	Received 06-03-97. Order filed. (Calkins, J.) It is hereby ORDERED, that counsel for the Secretary of the United States Department of Labor is granted ten minutes to participate in oral arguments on pending motions regarding sovereign immunity and the FLSA state of limitations.
" "	06-04-97 mailed copy to Kaighn Smith, Timothy Belcher, Peter Brann and Ellen L. Beard, Esqs.
June 6	Received 6-5-97. Defendant's Supplemental Brief on Sovereign Immunity with Exhibit A & B filed.
" "	Letter from Peter Brann, AAG regarding scheduling on 6-16-97.
" "	Received 6-6-97. Corrected Defendant's Supplemental Brief on Sovereign Immunity with Exhibit A & B filed.
June 19	On 06-16-97. Hearing held on Plaintiff's Motion to Dismiss, Defendant's Motion for Judgment on the Pleadings, Sovereign Immunity and Course of Future Proceedings. Court takes all matters under advisement. Calkens, J. Presiding. Timothy Thompson, Court Reporter.
July 22	Received 07-21-97. Decision and Order filed. (Calkins, J.) "JUDGMENT" The motion of the defendant State of Maine for judgment on the pleadings is granted. Judgment is granted to the defendant State of Maine.

Date	PROCEEDINGS
1997	
" "	07-22-97 mailed copy to Kaighn Smith, Timothy Belcher and Peter Brann, Esqs.
Aug. 07	Received 08-06-97. Plaintiff's Notice of Appeal from the Judgment entered on July 22, 1997 filed.
" "	Plaintiff's Certificate Regarding Transcript filed.
" "	Plaintiff's Statement of the Issue of Appeal filed.
" "	Plaintiff's Appeal fee NOT PAID.
" "	On 08-07-97. Copies of the Docket Entries and Notice of Appeal sent to Timothy Thompson, Court Reporter.
" "	On 08-07-97. Attested copies of the Docket Entries and Notice of Appeal given to the Clerk of the Law Court on this date.
" "	On 08-07-97. Copy given to Justice Calkins in Cumberland County.
" "	On 08-07-97 mailed copy to Timothy L. Belcher and Peter Brann, Esqs.
Aug. 15	Received 08-14-97: Plaintiff's Appeal of \$100.00 PAID. Attested Copy of Docket Sheet given to the Clerk of the Law Court on this date.
Aug 27	On 08-27-97. Complete file transmitted to the Clerk of the Law Court on this date.
" "	On 08-27-97. Copies of the "Law" Index, Exhibit Transmission Sheet and Docket Entries mailed to Donald Fonataine, Timothy Belcher and Peter Brann, Esqs.

SUPREME JUDICIAL COURT
OF MAINE

—
CUM-97-446

JOHN H. ALDEN, *et al.*

v.

STATE OF MAINE
—

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
1997	
8/7/97	Notice of Appeal filed
10/7/97	Appellants' Brief filed
11/24/97	Appellee's Brief filed
11/24/97	Amicus Brief of United States filed
12/8/97	Appellants' Reply Brief filed
12/8/97	Appellee's Brief filed
1998	
8/4/98	Opinion filed

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT

—
Civil Action Docket No. ——— CV-96-751

J. H. ALDEN, *et als.*,

v.

STATE OF MAINE,

Plaintiffs

Defendant

COMPLAINT

NOW COME Plaintiffs, John H. Alden, Walter Anderson, Lawrence D. Austin, Cynthia Ayer, David M. Barrett, Douglas L. Boothby, Elizabeth A. Buxton, Richard E. Charest, David E. Cyr, Francis R. Cyr, Peter J. Deane, Joseph S. DeFilipp, Patrick T. Delahanty, Joseph J. Denticco, Daniel Dodge, Maura S. Douglass, David Eldridge, Scott R. Erickson, Timothy G. Farr, Richard H. Flanagan, William D. Francis, Lewis E. Frey, Richard Godin, Normand W. Guay, Alan Hybers, Pauline A. Gudas, Alexandria M. Helms, William W. Jackson, William Jones, John H. Lorenzen, Roman J. Maxsimic, Jon A. Mills, Michael R. Morin, Lisa K. Nash, Steven J. Onacki, J. Charles O'Roak, Susan Priest Pierce, Lewis W. Randall, Michael K. Roach, Alison B. Smith, David L. Snyder, Charles D. Strandberg, David G. Summers, Mark W. Warner, Joyce Williams, Francis P. Witts and Corinne Zipps, and state for their complaint against the State of Maine as follows:

1. Plaintiffs bring this action to recover from Defendant unpaid overtime compensation and an additional amount as liquidated damages, pursuant to 29 U.S.C.

§ 201 et seq. (the Fair Labor Standards Act), as more fully set forth herein.

2. Plaintiffs reside in various counties including Cumberland County, State of Maine.

3. At all material times herein they were employed by Defendant, State of Maine, as Probation Officers, Probation & Parole Officers, Juvenile Caseworkers and/or Probation & Parole Officers II in this action.

4. Defendant, State of Maine, is an employer as that term is used in 29 U.S.C. § 203(d).

5. At all material times herein Plaintiffs worked more than forty (40) hours per week in their employment for Defendant, and Defendant failed to compensate Plaintiffs for hours worked in excess of 40 hours in a week at the rate of one and one-half times their regular rate.

6. Defendant has repeatedly, intentionally, and willfully violated the provisions of 29 U.S.C. § 201 et. seq. by employing Plaintiffs for work weeks longer than forty (40) hours without compensating them for said employment in excess of forty (40) hours in said work weeks, at rates not less than one and one-half times the regular rate at which they were employed.

WHEREFORE, Plaintiff prays this Court:

a. enter judgment for the Plaintiffs and against the Defendant on the basis of the Defendants' willful violations of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq.;

b. award Plaintiffs actual and compensatory damages in the amount shown to be due for unpaid minimum wages and overtime compensation, with interest;

c. award Plaintiff an equal amount in liquidated damages;

d. award Plaintiff reasonable attorney's fees and cost of suit;

e. grant such other relief as this Court deems equitable and just.

Dated: 7/31/96

/s/ Donald F. Fontaine
DONALD F. FONTAINE, ESQ.
KAIGHN SMITH, JR., ESQ.
Counsel for Plaintiffs

FONTAINE & BEAL, P.A.
482 Congress Street
Portland, ME 04011
(207) 879-1879

SUPERIOR COURT

[Caption Omitted]

AMENDED COMPLAINT

NOW COME Plaintiffs, John H. Alden, Walter Anderson, Lawrence D. Austin, Cynthia Ayer, David M. Barrett, Douglas L. Boothby, Nancy Bouchard, Randolph E. Brown, Elizabeth A. Buxton, Susan A. Carey, Richard E. Charest, David E. Cyr, Francis R. Cyr, Peter J. Deane, Joseph S. DeFilipp, Patrick T. Delahanty, Joseph J. Dentico, Daniel Dodge, Maura S. Douglass, Raymond Dzialo, David Eldridge, Scott R. Erickson, E. Donald Finnegan, Pauline N. Flagg, Richard H. Flanagan, William D. Francis, Lewis E. Frey, Richard Godin, Sandria J.C. Griffin, Pauline A. Greateon Gudas, Normand W. Guay, Karen Hartnagle, Alexandria Helms, Alan Hybers, William W. Jackson, Betsy Jaegerman, William H. Jones, Wayne Libby, John H. Lorenzen, Richard E. Manning, Barbara J. Mascetta, Roman Maxsimic, Terry Michaud, Jon A. Mills, Michael R. Morin, Lisa K. Nash, Steven Onacki, J. Charles O'Roak, Nancy R. Peck, Susan P. Pierce, Lewis W. Randall, Michael K. Roach, Mark E. Sellinger, Alison B. Smith, David Snyder, Charles D. Strandberg, David G. Summers, Mark W. Warner, Joyce Williams, Francis P. Witts, Allen O. Wright and Corinne Zipps and state for their complaint against the State of Maine as follows:

INTRODUCTION

1. This action concerns violation of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq.: the unlawful exclusion of certain classes of employees from the coverage of the Act.

BACKGROUND

2. Plaintiffs previously brought claims, as set forth herein, in the United States District Court for the District of Maine on complaints filed December 21, 1992 and May 18, 1993, where they prevailed against Defendant State of Maine on dispositive motions addressing Defendant's liability under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (the "Act"). The matter was pending for determination of the award of remedies under the Act when the Supreme Court decided *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), and as a result of that decision, the federal court dismissed the case for lack of subject matter jurisdiction on July 3, 1996.¹ Plaintiffs, who reside throughout the State of Maine, including Cumberland County, now bring their claims in this court to obtain their rightful remedies under the law.

PARTIES

3. Plaintiffs are or were employed by Defendant, State of Maine, as Probation Officer, Probation & Parole Officer,

¹ The federal court had appointed a Special Master to assist in the determination of Plaintiffs' unpaid overtime compensation under the Act. In its Order of July 3, 1996, the court said:

I observe that after months of proceedings the Special Master filed his final report on April 17, 1996. Both parties have objected to the report. The plaintiffs have articulated their objections, whereas the State simply filed an objection and requested a briefing schedule, a transparent attempt to delay the articulation of their objections that I would not ordinarily countenance. Because I lack jurisdiction at this stage, however, there is nothing to be done on the Special Master's report. There is likewise nothing to be gained by oral argument on the State's motion to dismiss. It is unfortunately a tragic consequence of the Supreme Court's inability to maintain the status of its own precedents that all this time and effort has been wasted.

Jon Mills, et al. v. State of Maine, Civil No. 92-41-P-H slip op. at 2 (D.Me. July 3, 1996) (Hornby, J.) (quotations and citations omitted).

Juvenile Caseworker and Probation & Parole Officer II and have worked in excess of 40 hours in a week at all material times herein, including but not limited to, the 3 years prior to the filing of their complaints in federal court as set forth in paragraph 2.

4. Attached hereto as Exhibit 1 are forms setting forth each individual Plaintiff's consent to be a party in this action.

5. Defendant, State of Maine, is an employer as that term is used in 29 U.S.C. section 203(d).

IMPROPER EXCLUSIONS FROM COVERAGE

6. The allegations in paragraphs 1-5 are incorporated here.

7. Defendant, State of Maine, has excluded all employees in certain classifications of Probation and Parole Officer from the coverage of the Fair Labor Standards Act.

8. Defendant, State of Maine, has excluded all employees in the excluded classification from the coverage of the Fair Labor Standards Act without regard to the individuals' actual duties or qualifications.

9. Defendant, State of Maine, has not compensated these employees in these excluded classifications for hours worked in excess of 40 hours in a week at the rate of one and one-half times their regular rate.

10. The excluded classifications included Probation Officer, Probation & Parole Officer, Juvenile Caseworker and Probation & Parole Officer II.

11. By failing to compensate employees in the excluded classifications for hours in excess of the maximum allowed under 29 U.S.C. section 207 at a rate of one and one-half times their regular rate, Defendant, State of Maine, willfully violated 29 U.S.C. section 207.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

1. Order Defendant, State of Maine, to pay damages to each Plaintiff in an excluded classification who worked more than 40 hours in any week equal to (a) the number of overtime hours times one and one-half times the employee's regular rate minus compensation actually received plus (b) an equal amount as liquidated damages;

2. Enter judgment in favor of the Plaintiffs and against Defendant;

3. Grant Plaintiffs the costs of this action, including reasonable attorney fees; and

4. Grant such other relief as is just and proper.

Dated: August 30, 1996

/s/ [Illegible]

DONALD F. FONTAINE, ESQ.
KAIGHN SMITH, JR., ESQ.
FONTAINE & BEAL, P.A.
482 Congress Street
Portland, ME 04011
(207) 879-1879

Counsel for Plaintiffs

SUPERIOR COURT

[Caption Omitted]

DEFENDANT'S ANSWER

The defendant, State of Maine, respond to the plaintiffs' amended complaint dated August 30, 1996 ("complaint"), by and through their counsel, on information and belief, as follows:

ANSWER

1. The defendant admits that the plaintiffs assert that the defendant violated the Fair Labor Standards Act ("FLSA"), but otherwise deny the allegations of this paragraph of the complaint.

2. The defendant admits that the plaintiffs previously filed suit against the defendant in federal court, admits that the federal court dismissed that action for lack of subject matter jurisdiction, but otherwise deny the allegations of this paragraph of the complaint.

3. The defendant admits that the plaintiffs are or were employed as Probation Officer, Probation & Parole Officer, Juvenile Caseworker, and Probation & Parole Officer II, but otherwise deny the allegations of this paragraph of the complaint.

4. The defendant does not respond to this paragraph of the complaint because the referenced documents speak for themselves.

5. The defendant denies the allegations of this paragraph of the complaint.

6. The defendant repeats and realleges its responses to the allegations of the referenced paragraphs of the complaint.

7. The defendant denies the allegations of this paragraph of the complaint.

8. The defendant denies the allegations of this paragraph of the complaint.

9. The defendant denies the allegations of this paragraph of the complaint.

10. The defendant denies the allegations of this paragraph of the complaint.

11. The defendant denies the allegations of this paragraph of the complaint.

AFFIRMATIVE DEFENSES

Expressly reserving the right to amend and/or supplement the defenses set forth below, and reserving and not waiving all defenses, the defendant asserts at this time the following defenses to the complaint:

FIRST DEFENSE

12. The plaintiffs have failed to state a claim against the defendant upon which relief may be granted.

SECOND DEFENSE

13. The plaintiffs' claims against the defendant are barred by the doctrine of sovereign immunity.

THIRD DEFENSE

14. The plaintiffs' claims against the defendant are barred by the applicable statutes of limitation and by the doctrine of laches.

FOURTH DEFENSE

15. The plaintiffs' claims against the defendant are barred by the doctrines of waiver, estoppel, and unclean hands.

FIFTH DEFENSE

16. The plaintiffs' claims against the defendant are barred by the doctrines of release and accord and satisfaction.

SIXTH DEFENSE

17. The plaintiffs' claims against the defendant are barred by the Portal to Portal Act, as amended.

SEVENTH DEFENSE

18. The plaintiffs' claims against the defendant are barred by the terms of the collective bargaining agreement.

EIGHTH DEFENSE

19. The plaintiffs' claims against the defendant are barred by the exemptions contained in the FLSA, including the law enforcement and professional exemptions.

NINTH DEFENSE

20. The plaintiffs' claims against the defendants are barred by the doctrine of *de minimus* overtime contained in the FLSA.

TENTH DEFENSE

21. The plaintiffs' claims against the defendant are barred by the doctrines of *res judicata*, collateral estoppel, claim preclusion, and issue preclusion.

ELEVENTH DEFENSE

22. If the plaintiffs worked in excess of 40 hours a week, which the defendant denies, the plaintiffs were properly compensated under the terms of the collective bargaining agreement, and are not entitled to any additional compensation.

TWELFTH DEFENSE

23. If the plaintiffs worked in excess of 40 hours a week, which the defendant denies, it was in violation of

the defendant's policies and practices, and without the knowledge and consent of the defendant, and are not entitled to any additional compensation.

THIRTEENTH DEFENSE

24. If the plaintiffs worked in excess of 40 hours a week, which the defendant denies, the plaintiffs' claims against the defendant are subject to offset based on payments and compensatory time off provided by the defendant to the plaintiffs.

CONCLUSION

Wherefore, the defendant demands judgment dismissing the complaint with prejudice in its entirety against and in favor of it, awarding it its cost and attorneys' fees, and awarding such other and further relief as the court may deem appropriate and necessary under the circumstances.

Dated: September 26, 1996
Augusta, Maine

Respectfully submitted,

ANDREW KETTERER
Attorney General

/s/ P. J. Brann
PETER J. BRANN
Assistant Attorney General
Six State House Station
Augusta, ME 04333
(207) 626-8800
Attorneys for Defendant

SUPERIOR COURT

[Caption Omitted]

SECOND AMENDED COMPLAINT

NOW COME Plaintiffs, John H. Alden, Walter Anderson, Lawrence D. Austin, Cynthia Ayer, David M. Barrett, Douglas L. Boothby, Nancy Bouchard, Randolph E. Brown, Elizabeth A. Buxton, Susan A. Carey, Richard E. Charest, David E. Cyr, Francis R. Cyr, Peter J. Deane, Joseph S. DeFilipp, Patrick T. Delahanty, Joseph J. Dentico, Daniel Dodge, Maura S. Douglass, Raymond Dzialo, David Eldridge, Scott R. Erickson, E. Donald Finnegan, Pauline N. Flagg, Richard H. Flanagan, William D. Francis, Lewis E. Frey, Richard Godin, Sandria J.C. Griffin, Pauline A. Greateon Gudas, Normand W. Guay, Karen Hartnagle, Alexandria Helms, Alan Hybers, William W. Jackson, Betsy Jaegerman, William H. Jones, Wayne Libby, John H. Lorenzen, Richard E. Manning, Barbara J. Mascetta, Roman Maxsimic, Terry Michaud, Donna M. Miles, Jon A. Mills, Michael R. Morin, Lisa K. Nash, Martha Jo Nichols, Donald Paxton Parsley, Steven Onacki, J. Charles O'Roak, Nancy R. Peck, Susan P. Pierce, Lewis W. Randall, Michael K. Roach, Mark E. Sellinger, Alison B. Smith, David Snyder, Charles D. Strandberg, David G. Summers, Mark W. Warner, Joyce Williams, Francis P. Witts, Allen O. Wright and Corinne Zipps and state for their complaint against the State of Maine as follows:

INTRODUCTION

1. This action concerns violation of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq.: the unlawful exclusion of certain classes of employees from the coverage of the Act.

BACKGROUND

2. Plaintiffs previously brought claims, as set forth herein, in the United States District Court for the District of Maine on complaints filed December 21, 1992 and May 18, 1993, where they prevailed against Defendant State of Maine on dispositive motions addressing Defendant's liability under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (the "Act"). The matter was pending for determination of the award of remedies under the Act when the Supreme Court decided *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), and as a result of that decision, the federal court dismissed the case for lack of subject matter jurisdiction on July 3, 1996.¹ Plaintiffs, who reside throughout the State of Maine, including Cumberland County, now bring their claims in this court to obtain their rightful remedies under the law.

PARTIES

3. Plaintiffs are or were employed by Defendant, State of Maine, as Probation Officer, Probation & Parole Officer,

¹ The federal court had appointed a Special Master to assist in the determination of Plaintiffs' unpaid overtime compensation under the Act. In its Order of July 3, 1996, the court said:

I observe that after months of proceedings the Special Master filed his final report on April 17, 1996. Both parties have objected to the report. The plaintiffs have articulated their objections, whereas the State simply filed an objection and requested a briefing schedule, a transparent attempt to delay the articulation of their objections that I would not ordinarily countenance. Because I lack jurisdiction at this stage, however, there is nothing to be done on the Special Master's report. There is likewise nothing to be gained by oral argument on the State's motion to dismiss. It is unfortunately a tragic consequence of the Supreme Court's inability to maintain the status of its own precedents that all this time and effort has been wasted.

Jon Mills, et al. v. State of Maine, Civil No. 92-41-P-H slip op. at 2 (D.Me. July 3, 1996) (Hornby, J.) (quotations and citations omitted).

Juvenile Caseworker and Probation & Parole Officer II and have worked in excess of 40 hours in a week at all material times herein, including but not limited to, the 3 years prior to the filing of their complaints in federal court as set forth in paragraph 2.

4. Attached hereto as Exhibit 1 are forms setting forth each individual Plaintiff's consent to be a party in this action.

5. Defendant, State of Maine, is an employer as that term is used in 29 U.S.C. section 203(d).

IMPROPER EXCLUSIONS FROM COVERAGE

6. The allegations in paragraphs 1-5 are incorporated here.

7. Defendant, State of Maine, has excluded all employees in certain classifications of Probation and Parole Officer from the coverage of the Fair Labor Standards Act.

8. Defendant, State of Maine, has excluded all employees in the excluded classifications from the coverage of the Fair Labor Standards Act without regard to the individuals' actual duties or qualifications.

9. Defendant, State of Maine, has not compensated these employees in these excluded classifications for hours worked in excess of 40 hours in a week at the rate of one and one-half times their regular rate.

10. The excluded classifications included Probation Officer, Probation & Parole Officer, Juvenile Caseworker and Probation & Parole Officer II.

11. By failing to compensate employees in the excluded classifications for hours in excess of the maximum allowed under 29 U.S.C. section 207 at a rate of one and one-half times their regular rate, Defendant, State of Maine, willfully violated 29 U.S.C. section 207.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

1. Order Defendant, State of Maine, to pay damages to each Plaintiff in an excluded classification who worked more than 40 hours in any week equal to (a) the number of overtime hours times one and one-half times the employee's regular rate minus compensation actually received plus (b) an equal amount as liquidated damages;

2. Enter judgment in favor of the Plaintiffs and against Defendant;

3. Grant Plaintiffs the costs of this action, including reasonable attorney fees; and

4. Grant such other relief as is just and proper.

Dated: 12/11/96

/s/ [Illegible]

DONALD F. FONTAINE, ESQ.
KAIGHN SMITH, JR., ESQ.
FONTAINE & BEAL, P.A.
482 Congress Street
Portland, ME 04011
(207) 879-1879
Counsel for Plaintiffs

SUPERIOR COURT

[Caption Omitted]

**DEFENDANT'S ANSWER TO
SECOND AMENDED COMPLAINT**

Pursuant to Rule 10(c) of the Maine Rules of Civil Procedure, the defendant, State of Maine, answers the Plaintiffs' Second Amended Complaint dated December 11, 1996, by adopting by reference the Defendant's Answer to Amended Complaint, dated September 26, 1996.

Dated: December 16, 1996
Augusta, Maine

Respectfully submitted,

ANDREW KETTERER
Attorney General

/s/ P. J. Brann
PETER J. BRANN
Assistant Attorney General
Six State House Station
Augusta, ME 04333-0006
(207) 626-8800
Attorneys for Defendant

SUPERIOR COURT

[Caption Omitted]

ORDER

The Plaintiffs' Motion to Amend Complaint is hereby granted. The Plaintiffs' Second Amended Complaint shall govern further proceedings in this matter.

Dated: 12/18/96

/s/ [Illegible]
Justice, Superior Court

SUPERIOR COURT

[Caption Omitted]

**PLAINTIFFS' MOTION TO DISMISS CERTAIN
AFFIRMATIVE DEFENSES WITH INCORPORATED
MEMORANDUM OF LAW**

The Plaintiffs in this matter, through counsel, hereby move to dismiss Defendant's Second Affirmative Defense that Plaintiffs' claims are barred by the doctrine of sovereign immunity and its Third Affirmative Defense that their claims are barred by the statute of limitations.

I. BACKGROUND

This is an action for unpaid overtime wages withheld from Plaintiffs by the State of Maine, their employer, dating back to December 21, 1989. See *Second Amended Complaint* at ¶¶ 2, 3. Plaintiffs assert claims under the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. ("FLSA"). Plaintiffs previously filed their claims in the United States District Court for the District of Maine on December 18, 1992 in an action captioned *Jon Mills, et al. v. State of Maine* (D.Me. Civil Action No. 92-0410-P-H) ("*Mills*"). A true and accurate copy of that Complaint is attached hereto as Exhibit A.¹ Thereafter, pursuant to dispositive motions, Plaintiffs prevailed on their liability claims. The U.S. District Court appointed a Special Master to report on the proper measure of damages. Before determination of the award of damages, however, the Supreme Court decided *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). As a result of that decision, the federal court dismissed the case for lack of subject matter jurisdiction because of the state's immunity

¹ Certain Plaintiffs filed an Amended Complaint in the federal court on May 18, 1993.

from suit in federal court under the Eleventh Amendment. The U.S. District Court's order of dismissal in *Mills* is attached hereto as Exhibit B.

Plaintiffs then filed their identical claims in this court on July 31, 1996.² Defendant now asserts that the Plaintiffs claims are barred by the "doctrine of sovereign immunity" and by the "statute of limitations."

**II. THE STATE CANNOT ASSERT THE DOCTRINE
OF SOVEREIGN IMMUNITY AS A DEFENSE IN
THIS CASE**

Article VI of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Supreme Court has ruled that when "a federal statute . . . impose[s] liability upon the States, the Supremacy Clause makes that statute the law in every State fully enforceable in state court." *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 207, 112 S.Ct. 560, 566 (1991). This holding applies despite the Eleventh Amendment's prohibition on suing a state in federal court, as the Eleventh Amendment has no applicability to state courts.³

² Plaintiffs' Amended Complaint was filed August 30, 1996, prior to Defendant's Answer. Three additional Plaintiffs, Martha Jo Nichols, Donald P. Parsley, and Donna M. Miles joined this case with claims identical to those that they had with the others in the *Miles* case pursuant to the Second Amended Complaint, filed December 11, 1996. The Plaintiffs' motion to file the Second Amended Complaint was granted on December 18, 1996.

³ For an extended explanation of the supremacy of federal law, see *Howlett v. Rose*, 496 U.S. 356, 367-75, 110 S.Ct. 2430, 2438-42 (1990).

It is well-established that Congress intended to abrogate the sovereign immunity of the states in FLSA. *E.g. Brinkman v. Department of Corrections of State of Kansas*, 21 F.3d 370 (10th Cir.), *cert. denied*, 115 S.Ct. 315 (1994) (allowing suit by employees against state and state agencies); *Jacobs v. College of William and Mary*, 495 F.Supp. 183 (D.Va.), *aff'd* 661, F.2d 922, *cert. denied*, 454 U.S. 1033 (1980) (same); *Brennan v. State of Iowa*, 494 F.2d 100 (8th Cir.), *cert. denied*, 421 U.S. 1015 (1974) (allowing suit by United States against state); *Dunlop v. State of R.I.*, 398 F.Supp. 1269 (D.R.I. 1975) (same). State courts routinely entertain such actions. *See, e.g., Tefft v. Montana*, 894 P.2d 317 (Mont. 1995); *Laffence v. Colorado*, 910 P.2d 73 (Colo. Ct. App. 1995); *Forry v. Department of Natural Resources*, 889 S.W.2d 838 (Mo. Ct. App. 1994); *Casserly v. Colorado*, 844 P.2d 1275 (Col. Ct. App. 1992).

In sum, it is clear that Congress abrogated the states' sovereign immunity to suit under FLSA, making the state employers liable in state court for failing to pay overtime wages as required by federal law. Congress has the power to do so under the Supremacy Clause of the United States Constitution. The State's asserted defense of sovereign immunity is therefore without merit.

III. PLAINTIFFS' CLAIMS FOR REMEDIES UNDER THE FLSA, DATING BACK TO THREE YEARS PRIOR TO THE FILING OF THEIR IDENTICAL CLAIMS IN THE *MILLS* CASE ARE NOT BARRED BY THE STATUTE OF LIMITATIONS BECAUSE IT WAS TOLLED DURING THE PENDENCY OF THE *MILLS* CASE.

Plaintiffs' claims for violations of the FLSA may be brought within three years of the State's violations. 29 U.S.C. § 255. In *Mills*, Plaintiffs brought their claims against the State for violations extending 3 years prior to

the date of the filing of that action, December 21, 1989. *See Exhibit A* at 1, 5 (page 1 stamp-dated filed in U.S. District Court on 12/21/89, page 5, claiming FLSA remedies for 3 years prior to filing). Defendants cannot now claim that Plaintiffs' claims are time-barred. The pendency of Plaintiffs' identical claims in federal court tolls the running of the statute of limitations in the instant case.

The Supreme Court addressed a similar situation in *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 85 S.Ct. 1050 (1965). In *Burnett*, an employee filed an action under the Federal Employers' Liability Act (FELA) in an Ohio state court. Although FELA actions may be brought in state or federal courts, the Ohio court dismissed the case because venue was improper. The plaintiff refiled the case in federal court eight days after the state court dismissal, but the district court dismissed the action because it was filed in that court more than three years (the applicable statute of limitations) after the action accrued. The Supreme Court reversed and held that "when a plaintiff begins a timely FELA action in a state court of competent jurisdiction, service of process is made upon the opposing party, and the state court action is later dismissed because of improper venue, the FELA limitation is tolled during the pendency of the state action." 380 U.S. at 428, 85 S.Ct. at 1054. Applying the doctrine of equitable tolling, the Court refused to elevate form over substance and held that the purpose of the statute of limitation was fulfilled because the Defendant was clearly on notice of the Plaintiffs' claims. *See id.* at 1054. *See also Chevron Oil Co. v. Huson*, 92 S.Ct. 349 (1956) (applying equitable tolling principle in refusing to dismiss as untimely a case, filed over one year after cause of action accrued, when the case was filed before a decision holding that the applicable statute of limitations was one year).

Numerous state courts similarly apply equitable tolling principles when there is plainly no prejudice to the defend-

ant in circumstances identical to the instant case. *E.g.* *Addison v. State*, 578 P.2d 941 (Cal. 1978) (tort claim that was timely filed in federal court stays statute of limitations for a subsequent filing; federal court dismissed for lack of jurisdiction); *Galligan v. Westfield Centre Service, Inc.*, 412 A.2d 122 (N.J. 1980) (same); *Torres v. Parkview Foods*, 468 N.E.2d 580, 583 (Ind.App. 1984) ("when in good faith a plaintiff brings an action in federal court within the statute of limitations, but it fails for lack of diversity jurisdiction, the statute of limitations is tolled with the filing of the suit for purposes of determining whether a subsequent state action involving the same parties and the same claims is brought within the statute of limitations").

In applying the doctrine of equitable tolling, Courts consider timely notice, and lack of prejudice to the defendant, and reasonable and good faith conduct on the part of the plaintiff. *See, e.g., Addison*, 578 P.2d at 943-44; *Galligan*, 412 A.2d at 125. These elements are clearly met in the present case. Plaintiffs filed timely claims against the Defendant in federal court on December 21, 1991, won their liability case, proceeded to a Special Master for their appropriate relief and then faced dismissal for want of jurisdiction by the Supreme Court's decision in *Seminole*, which reversed earlier precedent. *See* Exhibit B. Plaintiffs then brought their identical claims in this Court.

On December 21, 1991, Defendant had timely notice of Plaintiffs' claims for overtime wages and other remedies under the FLSA for the preceding 3 years. Plaintiffs now bring the same claims in this Court in full good faith to obtain their rightful relief after the unanticipated dismissal of their case for lack of jurisdiction in federal court. The doctrine of equitable tolling applies directly to this situation. Thus, Defendants cannot assert that Plaintiffs' claims are now time-barred by the applicable FLSA three year statute of limitations.

IV. CONCLUSION

For all of the above reasons, Defendant's Second Affirmative Defense that Plaintiffs' claims are barred by the doctrine of sovereign immunity and its Third Affirmative Defense that their claims are barred by the statute of limitations must be dismissed.

Dated: 12/18/96

/s/ Kaighn Smith, Jr.
KAIGHN SMITH, JR., ESQ.
DONALD F. FONTAINE
FONTAINE & BEAL, P.A.
482 Congress Street
Portland, ME 04011
(207) 879-1879
Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

92-410-P-H

JON MILLS, JOHN H. ALDEN, WALTER ANDERSON, CYNTHIA AYER, DAVID BARRETT, DANA J. BLACKIE, GEORGE R. BLACKMAN, DOUGLAS L. BOOTHBY, NANCY L. BOUCHARD, RANDOLPH E. BROWN, ELIZABETH BUXTON, SUSAN CAREY, LEE CARTER, RICHARD CHAREST, CLAIRE CHESLEY, JR., LEO T. COLLINS, DAVID CYR, FRANCIS R. CYR, JOAN DAWSON, PETER J. DEANE, JOSEPH S. DEFILIPP, PATRICK T. DELAHANTY, JOSEPH DENTICO, DANIEL DODGE, MAURA A. DOUGLASS, RAYMOND J. DZIALO, DAVID ELDRIDGE, SCOTT R. ERICKSON, TIMOTHY G. FARR, E. DONALD FINNEGAN, PAULINE N. FLAGG, RICHARD FLANAGAN, WILLIAM D. FRANCIS, LEWIS F. FREY, RICHARD GODIN, PAULINE A. GREATER, SANDRIA J.C. GRIFFIN, NORMAND W. GUAY, ROY C. GUTFINSKI, DANIEL HARFOUSH, KAREN HARTNAGLE, ALEXANDRIA HELMS, ALAN HYBERS, WILLIAM W. JACKSON, BETSY JAEGARMAN, WILLIAM JONES, PAUL KELLY, STEPHEN D. LIBBY, WAYNE LIBBY, JOHN LORENZEN, DARLENE LYNG, LINDA MAHER, RICHARD E. MANNING, GREG MASALSKY, BARBARA MASCETTA, ROMAN MAXSIMIC, MICHAEL O. McNALLY, TERRY W. MICHAUD, DONNA MILES, MARTHA MILLIMAN-TAKATSU, MERRILEE MONKS-PAINE, MICHAEL R. MORIN, LISA K. NASH, MARTHA JO NICHOLS, DANIEL O'NEILL, CHARLES O'ROAK, DANIEL OUELLETTE, DONALD P. PARSLEY, NANCY PECK, SUSAN PIERCE, LEWIS RANDALL, MICHAEL K. ROACH, RICHARD J. ROBBINS, RONALD M. SAGNER, KEITH L. SAVAGE, ALISON B. SMITH, DAVID L. SNYDER, CHARLES D. STRANDBERG, WAYNE STURDIVANT, ANN T. THERRIEN, MARK

W. WARNER, JOYCE WILLIAMS, ALLEN O. WRIGHT,
CORINNE ZIPPS,

Plaintiffs, -

v.

STATE OF MAINE,

Defendant.

COMPLAINT

Plaintiffs as a complaint against Defendant State of Maine allege the following:

INTRODUCTION

1. This action concerns violation of the Fair Labor Standards Act, 29 U.S.C. section 201 et seq.: the unlawful exclusion of certain classes of employees from the coverage of the Act.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. section 1331 and 29 U.S.C. section 216. Venue properly lies in this Court pursuant to 29 U.S.C. Section 1132 and pursuant to 29 U.S.C. Section 185(a).

PARTIES

3. Plaintiffs are or were employed by Defendant State of Maine as Probation Officer, Probation & Parole Officer, Juvenile Caseworker and Probation & Parole Officer II and have worked in excess of 40 hours in a week during the past three years.

4. Attached hereto as Exhibit 1 are forms setting forth each individual Plaintiffs' consent to be a party in this action.

5. Defendant State of Maine is an employer as that term is used in 29 U.S.C. section 203(d).

**FIRST CAUSE OF ACTION
IMPROPER EXCLUSIONS FROM COVERAGE**

6. The allegations in paragraphs 1-5 are incorporated here.

7. Defendant State of Maine has excluded all employees in certain classifications of Probation and Parole Officer from the coverage of the Fair Labor Standards Act.

8. Defendant State of Maine has excluded all employees in the excluded classifications from the coverage of the Fair Labor Standards Act without regard to the individuals' actual duties or qualifications.

9. Defendant State of Maine has not compensated these employees in these excluded classifications for hours worked in excess of 40 per week at the rate of one and one-half times their regular rate.

10. The excluded classifications include Probation Officer, Probation & Parole Officer, Juvenile Caseworker and Probation & Parole Officer II.

11. By failing to compensate employees in the excluded classifications for hours in excess of the maximum allowed under 29 U.S.C. section 207 at a rate of one and one-half times their regular rate, Defendant State of Maine willfully violated 29 U.S.C. section 207.

WHEREFORE Plaintiffs request that this Court grant the following relief:

1. Order Defendant State of Maine to pay damages to each Plaintiff in an excluded classification who worked more than 40 hours in any week during the past three years equal to (a) the number of overtime hours times one and one-half times the employees' regular rate minus compensation actually received plus (b) an equal amount as liquidated damages;

2. Enter judgment in favor of the Plaintiffs and against Defendants;

3. Grant Plaintiffs the costs of this action, including reasonable attorneys' fees; And

4. Grant such other relief as is just and proper.

Dated: December 18, 1992

Respectfully submitted,

/s/ John R. Lemieux
JOHN R. LEMIEUX, ESQ.
Counsel for Plaintiffs
PO Box 1072, 65 State St.
Augusta, ME 04332-1072
(207) 622-3151

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

[Caption Omitted]

ORDER

In light of *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114 (1996), it appears that on the eve of final judgment and after years of litigation this Court no longer has federal jurisdiction over the State's violation of federal wage and hour laws. *Accord Adams v. Kansas*, 919 F. Supp. 1496 (D. Kan. 1996); *Moad v. Arkansas State Police Dep't*, No. LR-C-94-450 (E.D. Ark. May 14, 1996); *Raper v. Iowa*, No. 4-94-CV-10237 (S.D. Iowa June 21, 1996). Nor do I have the authority to remand the case to the state courts, because the lawsuit was filed initially in federal court. The plaintiffs' arguments that jurisdiction can be sustained under Section 5 of the Fourteenth Amendment or that the Supreme Court's holding in *Seminole Tribe* on subject matter jurisdiction is prospective only and not applicable to this case are wholly unpersuasive. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993). The plaintiffs have likewise failed to make a persuasive case for discovery; there is no reason to conclude that discovery would turn up a consent to jurisdiction or waiver of the Eleventh Amendment.

The plaintiffs' motion to certify the constitutional question to the United States Attorney General under 28 U.S.C. § 2403(a) is GRANTED. *See also* Local Rule 13. The Clerk's Office shall notify the Attorney General that the State's motion to dismiss the complaint has called into question the constitutionality of 29 U.S.C. § 216(b) (Actions to recover for violations of the Fair Labor Standards Act "may be maintained against any employer (including a public agency) in any Federal or State court of com-

petent jurisdiction.") Because the constitutional issue is so clear following the Supreme Court's ruling in *Seminole Tribe*, however, I see no reason to await the outcome of the certification. If there is anything to be done here, it can be pursued on appeal.

I observe that after months of proceedings the Special Master filed his final report on April 17, 1996. Both parties have objected to the report. The plaintiffs have articulated their objections, whereas the State simply filed an objection and requested a briefing schedule, a transparent attempt to delay the articulation of their objections that I would not ordinarily countenance. Because I lack jurisdiction at this stage, however, there is nothing to be done on the Special Master's report. There is likewise nothing to be gained by oral argument on the State's motion to dismiss. It is unfortunately a tragic consequence of the Supreme Court's inability to maintain the status of its own precedents that all this time and effort has been wasted. *Compare Seminole Tribe* (holding that Congress lacks power) with *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (upholding Congress's power).

Accordingly, the Complaint is DISMISSED for lack of subject matter jurisdiction inasmuch as the State has not waived its Eleventh Amendment rights. The Clerk is directed to certify the constitutional question to the United States Attorney General. So ORDERED.

Dated this 3rd day of July, 1996.

/s/ D. Brock Hornby
D. BROCK HORNBY
United States District Judge

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT

Civil Action Docket No. CV-96-751

JOHN H. ALDEN, *et al.*,
v. *Plaintiffs,*
STATE OF MAINE,
Defendant.

DEFENDANT'S MOTION FOR
JUDGMENT ON THE PLEADINGS

Pursuant to Rule 12(c) of the Maine Rules of Civil Procedure, the defendant, State of Maine, moves for judgment on the pleadings on the grounds that (a) the plaintiffs' claims are barred by the doctrine of sovereign immunity, and (b) the plaintiffs' claims are barred by the statute of limitations.

Wherefore, the defendant requests that its motion for judgment on the pleadings be granted.

Dated: February 3, 1997 Respectfully submitted,
Augusta, Maine

ANDREW KETTERER
Attorney General

/s/ Peter J. Brann
PETER J. BRANN
Assistant Attorney General
Six State House Station
August, ME 04333-0006
(207) 626-8800
Attorneys for Defendant

SUPERIOR COURT

[Caption Omitted]

ORDER

Pursuant to the Plaintiffs' unopposed motion, Plaintiffs shall have until March 10, 1997, to file their Consolidated Opposition to Defendant's Motion for Judgment on the Pleadings and Reply to Defendant's Opposition to Plaintiffs' Motion to Strike Affirmative Defenses.

Dated 2/13/97

/s/ [Illegible]
Justice, Superior Court

SUPERIOR COURT

[Caption Omitted]

ORDER

The motion of the United States Department of Labor (USDOL) to file a brief as *amicus curiae* in this matter is hereby GRANTED without opposition.

On agreement of all parties, the USDOL shall file as *amicus curiae* on or before April 7, 1997. Defendant shall have 21 days from the filing of said brief to file a consolidated Reply Memorandum to the USDOL *amicus* brief and to the Plaintiffs' *Opposition to Defendant's Motion for Judgment on the Pleadings*, previously filed on March 10, 1997. Defendant's Reply Memorandum shall be strictly confined to addressing new matter raised in accordance with M.R.Civ.P. 7(e). Plaintiffs may likewise file a Reply Memorandum to the USDOL *amicus* brief within 21 days of the filing of said brief, which shall likewise be strictly confined to addressing new matter raised in accordance with M.R.Civ.P. 7(e).

The pending motions shall be set for oral argument by Clerk.

SO ORDERED.

Dated: 3/29/97

/s/ Susan Calkins
Justice, Superior Court

SUPERIOR COURT

[Caption Omitted]

THIRD AMENDED COMPLAINT

NOW COME Plaintiffs, John H. Alden, Walter Anderson, Lawrence D. Austin, Cynthia Ayer, David M. Barrett, Dana J. Blackie, Douglas L. Boothby, Nancy Bouchard, Randolph E. Brown, Elizabeth A. Buxton, Susan A. Carey, Richard E. Charest, David E. Cyr, Francis R. Cyr, Peter J. Deane, Joseph S. DeFilipp, Patrick T. Delahanty, Joseph J. Dentico, Daniel Dodge, Maura S. Douglass, Raymond Dzialo, David Eldridge, Scott R. Erickson, E. Donald Finnegan, Pauline N. Flagg, Richard H. Flanagan, William D. Francis, Lewis E. Frey, Richard Godin, Sandra J.C. Griffin, Pauline A. Groaton Gudas, Normand W. Guay, Karen Hartnagle, Alexandria Helms, Alan Hybers, William W. Jackson, Betsy Jaegerman, William H. Jones, Wayne Libby, John H. Lorenzen, Linda Maher, Richard E. Manning, Barbara J. Mascetta, Roman Maxsimic, Terry Michaud, Donna M. Miles, Jon A. Mills, Michael R. Morin, Lisa K. Nash, Martha Jo Nichols, Donald Paxton Parsley, Steven Onacki, J. Charles O'Roak, Nancy R. Peck, Susan P. Pierce, Lewis W. Randall, Michael K. Roach, Mark E. Sellinger, Alison B. Smith, David Snyder, Charles D. Strandberg, David G. Summers, Mark W. Warner, Joyce Williams, Francis P. Witts, Allen O. Wright and Corinne Zippa and state for their complaint against the State of Maine as follows:

INTRODUCTION

1. This action concerns violation of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*: the unlawful ex-

clusion of certain classes of employees from the coverage of the Act.

BACKGROUND

2. Plaintiffs previously brought claims, as set forth herein, in the United States District Court for the District of Maine on complaints filed December 21, 1992 and May 18, 1993, where they prevailed against Defendant State of Maine on dispositive motions addressing Defendant's liability under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (the "Act"). The matter was pending for determination of the award of remedies under the Act when the Supreme Court decided *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996), and as a result of that decision, the federal court dismissed the case for lack of subject matter jurisdiction on July 3, 1996.¹ Plaintiffs, who reside throughout the State of Maine, including Cumberland County, now bring their claims in this court to obtain their rightful remedies under the law.

¹ The federal court had appointed a Special Master to assist in the determination of Plaintiffs' unpaid overtime compensation under the Act. In its Order of July 3, 1996, the court said:

I observe that after months of proceedings the Special Master filed his final report on April 17, 1996. Both parties have objected to the report. The plaintiffs have articulated their objections, whereas the State simply filed an objection and requested a briefing schedule, a transparent attempt to delay the articulation of their objections that I would not ordinarily countenance. Because I lack jurisdiction at this stage, however, there is nothing to be done on the Special Master's report. There is likewise nothing to be gained by oral argument on the State's motion to dismiss. It is unfortunately a tragic consequence of the Supreme Court's inability to maintain the status of its own precedents that all this time and effort has been wasted.

Jon Mills, et al. v. State of Maine, Civil No. 92-41-P-H slip op. at 2 (D.Me. July 3, 1996) (Hornby, J.) (quotations and citations omitted).

PARTIES

3. Plaintiffs are or were employed by Defendant, State of Maine, as Probation Officer, Probation & Parole Officer, Juvenile Caseworker and Probation & Parole Officer II and have worked in excess of 40 hours in a week at all material times herein, including but not limited to, the three years prior to the filing of their complaints in federal court as set forth in paragraph 2.

4. Attached hereto as Exhibit 1 are forms setting forth each individual Plaintiff's consent to be a party in this action.

5. Defendant, State of Maine, is an employer as that term is used in 29 U.S.C. section 203(d).

IMPROPER EXCLUSION FOR COVERAGE

6. The allegations in paragraphs 1-5 are incorporated here.

7. Defendant, State of Maine, has excluded all employees in certain classifications of Probation and Parole Officer from the coverage of the Fair Labor Standards Act.

8. Defendant, State of Maine, has excluded all employees in the excluded classifications from the coverage of the Fair Labor Standards Act without regard to the individual's actual duties or qualifications.

9. Defendant, State of Maine, has not compensated these employees in these excluded classifications for hours worked in excess of 40 hours in a week at the rate of one and one-half times their regular rate.

10. The excluded classifications including Probation Officer, Probation & Parole Officer, Juvenile Caseworker and Probation & Parole Officer II.

11. By failing to compensate employees in the excluded classification for hours in excess of the maximum allowed under 29 U.S.C. section 207 at a rate of one and one-half times their regular rate, Defendant, State of Maine, willfully violated 29 U.S.C. section 207.

WHEREFORE, Plaintiffs request that this Court grant the following relief:

1. Order Defendant, State of Maine, to pay damages to each Plaintiff in an excluded classification who worked more than 40 hours in any week equal to (a) the number of overtime hours times one and one-half times the employee's regular rate minus compensation actually received plus (b) an equal amount as liquidated damages;

2. Enter judgment in favor of the Plaintiffs and against Defendant;

3. Grant Plaintiffs the costs of this action, including reasonable attorney fees; and

4. Grant such other relief as is just and proper.

Dated: 3/28/97

/s/ [Illegible]

DONALD F. FONTAINE, ESQ.
KAIGHN SMITH, JR., ESQ.
FONTAINE & BEAL, P.A.
482 Congress Street
Portland, ME 04011
(207) 879-1879
Counsel for Plaintiffs

SUPERIOR COURT

[Caption Omitted]

ORDER

The Plaintiffs' Motion to Amend Complaint is hereby granted. The Plaintiffs' Third Amended Complaint shall govern further proceedings in this matter.

Dated: 4/1/97

/s/ [Illegible]

Justice, Superior Court

SUPERIOR COURT

[Caption Omitted]

ORDER

The Plaintiffs' Motion for Extension of Time to Designate Experts in this matter is hereby GRANTED. Plaintiffs shall have until on or before June 11, 1997, to designate expert witnesses.

Dated: 4/4/97

/s/ [Illegible]
Justice, Superior Court

SUPERIOR COURT

[Caption Omitted]

**DEFENDANT'S ANSWER TO
THIRD AMENDED COMPLAINT**

Pursuant to Rule 10(c) of the Maine Rules of Civil Procedure, the defendant, State of Maine, answers the Plaintiffs' Third Amended Complaint dated March 28, 1997, by adopting by reference the Defendant's Answer to the Amended Complaint, dated September 26, 1996.

Dated: May 15, 1997
Augusta, Maine

Respectfully submitted,

ANDREW KETTERER
Attorney General

/s/ Peter J. Brann
PETER J. BRANN
Assistant Attorney General
Six State House Station
Augusta, ME 04333-0006
(207) 626-8800
Attorneys for Defendant

SUPERIOR COURT

 [Caption Omitted]

ORDER

Alexis M. Herman, Secretary of the United States Department of Labor, having moved for leave to participate in oral argument on pending motions, and the parties having received full opportunity to file any objections to this motion, it is hereby

ORDERED, that counsel for the Secretary of the United States Department of Labor is granted ten minutes to participate in oral argument on pending motions regarding sovereign immunity and the FLSA state of limitations.

Dated 6/2/97

/s/ Susan Calkins
 HON. SUSAN CALKINS
 Justice, Maine Superior Court

SUPERIOR COURT

 [Caption Omitted]

DECISION AND ORDER

The named plaintiffs in this case number approximately 65. They are all employed by the Defendant State of Maine as probation officers and juvenile caseworkers. In this action they allege that Maine owes them money for overtime work for which they should have been paid pursuant to the Fair Labor Standards Act (FLSA). 29 U.S.C. §§ 201 *et seq.*

An identical lawsuit was filed by many of these same plaintiffs in federal court on December 21, 1992. The federal court held that the provisions of FLSA prohibited Maine from excluding the plaintiffs from coverage of FLSA. *Mills v. State of Maine*, 839 F. Supp. 3, 4 (D. Me. 1993). It later held that liquidated damages and back pay for a two year period would be awarded to the plaintiffs. *Mills v. State of Maine*, 853 F. Supp. 551, 555, 556 (D.Me. 1994). The matter was referred to a special master for a determination on the amount of back pay owed to each plaintiff. Both parties filed objections to the master's report. Before a final judgment could be entered by the court, the case of *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996) was decided. Relying upon the holding in *Seminole*, the federal court determined that it lacked subject matter jurisdiction because Maine had not waived its Eleventh Amendment Rights.¹ The

¹ *Seminole* involved the Indian Gaming Regulatory Act which required states to negotiate with tribes and authorized suit against the state to compel performances of the state's duty under the Act. The Supreme Court held that "notwithstanding Congress' clear in-

court dismissed the complaint, and the First Circuit affirmed the dismissal. *Mills v. State of Maine*, No. 92-410-P-H, 1996 WL 400410 (D. Me. July 3, 1996), aff'd — F.3d —, No. 96-1973, 1997 WL 361186 (1st Cir. July 7, 1997). The First Circuit held that, although Congress expressly intended to abrogate state immunity in FLSA actions in federal court, Congress did not have power to do so under the Commerce Clause, the source of Congress' power to enact FLSA. The court further held that FLSA was not enacted pursuant to section 5 of the Fourteenth Amendment, which is a source of power by which Congress can abrogate sovereign immunity.

While the *Mills* case was pending, pursuant to a collective bargaining agreement, Maine began paying the probation officers and juvenile caseworkers for overtime, as of February 6, 1994.

On July 31, 1996, the plaintiffs filed the instant action. Maine's answer sets forth the affirmative defenses of sovereign immunity and statute of limitations, among others. Plaintiffs brought a motion to dismiss these two defenses, and Maine moved for judgment on the pleadings pursuant to Rule 12(c).

I. Statute of limitations

The statute of limitations for violations of FLSA is two years, unless the violation is willful, in which case the period of limitations is three years 29 U.S.C. § 255. In the federal court action, the plaintiffs sought FLSA remedies for three years prior to the filing of the action which was on December 21, 1992. It is not disputed that Maine has paid overtime to the plaintiffs since February 6, 1994. In this action the plaintiffs are seeking

tent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power . . ." *Seminole*, 116 S. Ct. at 1119. The Court expressly overturned *Pennsylvania v. Union Gas Co.* 491 U.S. 1 (1989) which had held that the Commerce Clause gave Congress the power to abrogate State's immunity under the Eleventh Amendment.

damages for the period of December 21, 1989 to February 6, 1994.

Maine argues that the two year period of limitations is applicable and that since this action was not filed until July 31, 1996, which was more than two years after Maine started paying overtime to the plaintiffs, the action must be dismissed. Maine points out that the federal court held that the two year period applied instead of the three year period because the violation was not willful. *Mills*, 853 F. Supp. at 555. The plaintiffs claim that the statute of limitations was tolled during the pendency of their federal action. Both parties acknowledge that federal law on limitations applies in this case because it is a federal statute of limitations that is at issue.

The Supreme Court held that the doctrine of equitable tolling is available in federal cases. *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 434-35 (1965). In *Burnett* the plaintiff filed a claim under the Federal Employers' Liability Act (FELA) in state court, but the action was dismissed for improper venue. A few days later the plaintiff filed the same action in federal court, but it was dismissed because the statute of limitations had run. Because the state action had been brought in a timely fashion and because the defendant was not unfairly surprised by the filing of the federal action, equitable tolling was appropriate. The Court held that equitable tolling furthered the policies and remedial purposes of FELA.

Many other federal cases have relied on *Burnett* and applied equitable tolling to a variety of federal limitations statutes including cases in which the defendant is a governmental entity.² *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). The courts look at whether the doctrine of equitable tolling will effectuate the pur-

² For a list of such cases see *Webb v. United States*, 66 F.3d 691, 696 (4th Cir. 1995).

pose of the statutory scheme; whether the plaintiff has been diligent; and whether the defendant will be surprised by the revival of a stale claim.³ Another factor utilized by the courts in deciding whether to allow equitable tolling is that the first action be filed in a court with apparent jurisdiction.⁴

Relating these factors to the instant case, it is apparent that the doctrine of equitable tolling should be applied. It can hardly be said that equitable tolling would not further the policies and purposes of FLSA which are set forth in 29 U.S.C. § 202. It is a remedial statute designed to correct and eliminate working conditions that are detrimental to the health and well-being of workers. An integral portion of the scheme is the right to collect wages that have been wrongfully withheld. Allowing the plaintiffs to finish in state court what they started to do in federal court furthers the policies of FLSA. Maine cannot claim unfair surprise nor complain about the staleness of the claims. Both parties had been working toward a resolution of each individual plaintiff's claim before the *Seminole* decision forced the federal court to stop the proceedings. Since the date of the filing of the federal suit Maine has been on notice that claims for unpaid overtime were being made. The requirement that the first court have apparent jurisdiction has been met in this case; the *Mills* court had jurisdiction until the decision in *Seminole*.

II. Sovereign Immunity

Maine submits that the doctrine of sovereign immunity bars the plaintiffs from obtaining any monetary damages

³ Where the plaintiff has been diligent and the defendant has been given notice of the claim, equitable tolling is appropriate. *Farrell v. Automobile Club of Michigan*, 870 F.2d 1129, 1134 (6th Cir. 1989) (allowed equitable tolling when ERISA claim brought in state court).

⁴ Filing an action in a court that clearly lacks jurisdiction will not toll the statute of limitations. *Farrell*, 870 F.2d at 1133.

from it. In support of this proposition, Maine relies upon four cases: *Moody v. Commissioner, Dept. of Human Services*, 661 A.2d 156 (Me. 1995); *Jackson v. State*, 544 A.2d 291 (Me. 1988), *cert. denied*, 491 U.S. 904 (1989); *Thiboutot v. State*, 405 A.2d 230 (Me. 1979), *aff'd on other grounds*, 448 U.S. 1 (1980); and *Drake v. Smith*, 390 A.2d 541 (Me. 1978).

Drake involved payments owed to a nursing home by the Maine Department of Human Services under a federal/state welfare program. The trial court ordered the Department to pay the nursing home, but the Law Court held that sovereign immunity required dismissal of the action.⁵ The court held that because the Maine Legislature had not waived the Eleventh Amendment immunity of the state to be sued in federal court for violations of the welfare program, it was not reasonable to believe that the Legislature had waived sovereign immunity protection in the state courts. *Drake*, 390 A.2d at 546.

Thiboutot involved benefits under Aid to Families with Dependent Children (AFDC) in which the court determined that the Maine Department of Human Services had violated the federal AFDC statute. The plaintiffs requested retroactive relief. The trial court's decision to deny retroactive benefits to members of the plaintiff class was upheld by the Law Court. Relying upon Supreme Court cases which held that the Eleventh Amendment barred recovery of retroactive benefits against a state in federal court, the Law Court held that state sovereign immunity likewise barred the award of retroactive benefits in state court. *Thiboutot*, 405 A.2d at 236-37.

In *Jackson*, the plaintiff sued the State for violation of his rights under the federal Rehabilitation Act. The trial

⁵ The Law Court declined to determine whether dismissal was required because of a lack of jurisdiction or for the absence of a cause of action. *Drake*, 390 at 543.

court ordered the State to pay damages. The Law Court reversed the damages award against the State.

For reasons similar to those expressed in *Thiboutot*, and still without conviction that this federal issue has been finally resolved, we conclude that the State may constitutionally interpose its sovereign immunity in state court as a bar to an award of damages under section 504 of the Rehabilitation Act.

Jackson, 544 A.2d at 298. The Law Court relied upon *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), in which the Supreme Court had held that states were immune from suit in federal court for violations of the Rehabilitation Act.

Moody involved the AFDC program and a violation of the due process rights of the plaintiffs by the Maine Department of Human Services. A similar case was brought in the federal court which found that the Department had violated the plaintiffs rights under the AFDC statute. The Department stopped the violation and complied with the federal decision. The trial court in the state action ordered the Department to notify members of the plaintiff class of their rights to certain payments, and the Law Court reversed. Since there was no ongoing violation of the law, the only purpose of the notice was to provide a means for the class members to seek retroactive payments. The Law Court held that an award of retroactive monetary relief was the same as damages to be paid from state funds and was barred by sovereign immunity. In a footnote, the Court stated:

The Eleventh Amendment to the United States Constitution precludes the federal courts from circumventing the sovereign immunity of the states. Although the Eleventh Amendment is not directly applicable to state courts, the doctrine of sovereign

immunity similarly protects the states from actions of state courts.

Id. at 158, n. 3 (Citations to *Thiboutot* and *Drake* omitted).

In a concurring opinion in *Moody*, Justice Lipez agreed that prior decisions of the Law Court mandated the result, but he found it "difficult to reconcile with the Supremacy Clause of the Federal Constitution." He agreed that the past decisions of the Law Court had relied upon Eleventh Amendment jurisprudence in the development of the sovereign immunity doctrine in Maine. Because the parties had not challenged that reliance, he found the *Moody* case an inappropriate one to examine whether the Eleventh Amendment principles should continue to be incorporated into the state sovereign immunity doctrine.

These four Maine cases make it apparent that in Maine the doctrine of state sovereign immunity has incorporated the principles of Eleventh Amendment immunity. Simply put, if a plaintiff can't seek damages against the state for violations of a federal law in federal court, the plaintiff can't seek damages in state court either.

Eleventh Amendment jurisprudence is the subject of much debate as can be seen from the vigorous dissents in *Seminole*. The majority accepted the historical view that the understanding of the framers of the United States Constitution was that states were immune as sovereigns. When it became apparent in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), that the Supreme Court did not share that general understanding, the Eleventh Amendment was quickly adopted. *Seminole*, 116 S.Ct. at 1130. For over a century a majority of the Court has recognized that the intent of the Amendment was broader than its literal meaning, and in interpreting the Amendment, the Court has gone beyond the plain meaning of its words. *Hans v. Louisiana*, 134 U.S. 1 (1890). The Amendment,

as interpreted bars all actions for money damages against states in federal court brought by anyone, unless the state has consented to suit. The Court speaks of the Eleventh Amendment as though it were synonymous with common law sovereign immunity. "[E]ach state is a sovereign entity . . . and . . . [i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole*, 116 S.Ct. at 1122 (citations and quotations marks deleted). Although there are other views on the subject of sovereign immunity as demonstrated by the dissents in *Seminole*, it is certainly rational for the Law Court to continue to apply Eleventh Amendment principles to state sovereign immunity.

Maine is not alone in relying upon Eleventh Amendment principles to form and illuminate state sovereign immunity law. Following a thorough discussion of the history of the Eleventh Amendment, the Ohio Supreme Court in *Mossman v. Donahey*, 346 N.E. 2d 305 (Ohio 1976) held that the reasoning and purpose of the Eleventh Amendment applied to suit in state courts as well. "[S]tate sovereign immunity is a right of constitutional proportions, whether it is considered to derive from the plan of the Constitution itself, or from the Eleventh Amendment. . . ." *Mossman*, 346 N.E. 2d at 312. *Accord Morris v. Massachusetts Maritime Academy*, 565 N.E. 2d 422 (Mass. (1991)).⁶

⁶ The memorandum of the Secretary of Labor suggests that *Morris* is no longer good law because of the decision of the Supreme Court in *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991). In *Morris* the issue was whether state sovereign immunity could be asserted in a Jones Act case. *Hilton* held that FELA and the Jones Act created a cause of action against states enforceable in state courts. Although the actual holding in *Morris* has been modified by *Hilton*, the proposition in *Morris*, that states look to Eleventh Amendment law to elucidate the states' sovereign immunity law, was not disturbed.

Hilton is a difficult case to place in the framework of the Court's Eleventh Amendment jurisprudence, except to recognize, as did

The plaintiffs seek to distinguish the instant case from the four Law Court cases relied upon by Maine. They correctly point out that the Supremacy Clause was not discussed in those four cases. They further argue that if those cases elevate sovereign immunity over the Supremacy Clause, they are wrongly decided and unconstitutional.

The plaintiffs argue that because FLSA unequivocally provides for the recovery of damages from states who have violated the FLSA provisions, the state courts must award such damages when violations are proven. They argue that FLSA, as federal law, is supreme under the Supremacy Clause and must be enforced by state courts. Some federal courts have suggested in dicta that such is the case. In *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996), the court dismissed a FLSA action by state employees against Ohio on Eleventh Amendment grounds and stated: "[S]tate employees may sue in state court for money damages under the FLSA, and a state court would be obligated by the Supremacy Clause to enforce federal law." See also *Aaron v. State of Kansas*, — F.3d —, No. 96-3095 (10th Cir., June 17, 1997). The Tenth Circuit cites to Justice Marshall's concurring opinion in *Em-*

Justice O'Connor in her dissent, that hard cases make bad law. 502 U.S. at 207. The majority's particularly heavy emphasis on stare decisis is perhaps the only way to explain the case. It certainly seems contrary to the holding in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989) which basically held that if you can't sue a state or state official in a § 1983 claim in federal court, you can't do so in state court either. *Hilton* itself emphasizes that it is a case of pure statutory interpretation, not constitutional interpretation. Whether *Hilton* remains good law after *Seminole* is questionable. *Hilton* claims to recognize the "federalism-related concerns that arise when the National Government uses the state courts as the exclusive forum to permit recovery under a congressional statute." Writing for the majority, Justice Kennedy stated that it was desirable to have a symmetry which makes a state's liability or immunity the same in both state and federal courts, but that symmetry could not override expectations that had been built upon stare decisis.

ployees of Dep't. of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 298 (1973), in which he stated that state courts have an independent constitutional obligation to enforce employees' rights under FLSA. While dicta from the federal courts cannot be ignored, it cannot be considered controlling particularly when the courts did not analyze the precise issue.

The Supremacy Clause argument would be persuasive but for the fact that it can only be applicable where the federal legislation is authorized. We now know that Congress does not have the power to abrogate Eleventh Amendment immunity, except when acting pursuant to the Fourteenth Amendment, and FLSA was not enacted under the Fourteenth Amendment. *Mills*, No. 96-1973, 1997 WL 361186. Thus, Congress did not have the power to abrogate Eleventh Amendment immunity in FLSA. Because Congress did not have power under the Commerce Clause to abrogate Eleventh Amendment immunity and because state sovereign immunity is synonymous with Eleventh Amendment immunity, Congress did not have the power to abrogate immunity of states to be sued for damages in their own courts, without their consent.⁷ Therefore, the Supremacy Clause does not come into play.

This court concludes that the Maine cases compel a ruling in this action that the plaintiffs are barred by the doctrine of sovereign immunity from collecting damages from Maine in this case. There being no claim for which relief can be granted, judgment must be granted for the State of Maine.

⁷ A state trial court in Wisconsin has come to the same conclusion in a FLSA action against a state agency. *German v. Wisconsin Dep't of Transp.*, Docket No. 96-DV-1261, (Circuit Court, Branch 2, March 11, 1997).

ORDER AND JUDGMENT

The motion of the defendant State of Maine for judgment on the pleadings is granted. Judgment is granted to the defendant State of Maine.

Dated: July 18, 1997

/s/ Susan Calkins
SUSAN CALKINS
Superior Court Justice

SUPERIOR COURT

[Caption Omitted]

NOTICE OF APPEAL

PLEASE TAKE NOTICE that the Plaintiffs, and each of them, appeal from the Order and Judgment entered by the Clerk of the Superior Court in this action on July 22, 1997 wherein judgment is granted to the Defendant, State of Maine.

Dated at Portland, Maine this 5th day of August, 1997.

/s/ Donald F. Fontaine
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MAINE SUPREME JUDICIAL COURT

[Caption Omitted]

APPELLANTS' BRIEF

STATEMENT OF THE CASE

The Plaintiffs are probation and parole officers employed by the State of Maine. In 1992 and 1993 they filed Complaints in Federal District Court to recover unpaid overtime wages under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. The State of Maine was found to have violated the Federal Act by failing to pay overtime wages to the Plaintiffs. *Mills v. Maine*, 853 F.Supp. 551, 555-56 (D.Me. 1994).¹ After months of proceedings before a Special Master, the matter was pending for decision before the U.S. District Court for the award of remedies when the Supreme Court decided *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). As a result of that decision, the Federal Court dismissed the case for lack of subject matter jurisdiction on July 3, 1996.²

¹ Over the course of nearly three years of proceedings in Federal Court, the Defendant State of Maine did not move to dismiss the Plaintiffs' claims on the grounds of the Eleventh Amendment, nor on the grounds of state sovereign immunity.

² The federal court had appointed a Special Master to assist in the determination of Plaintiffs' unpaid overtime compensation under the Act. In its Order of July 3, 1996, the court said:

I observe that after months of proceedings the Special Master filed his final report on April 17, 1996. Both parties have objected to the report. The plaintiffs have articulated their objections, whereas the State simply filed an objection and requested a briefing schedule, a transparent attempt to delay the articulation of their objections that I would not ordinarily countenance. Because I lack jurisdiction at this stage, how-

The Plaintiffs then filed a Complaint in the Superior Court. App. A-11. The State filed a responsive pleading raising various defenses among which was that this action is barred by Maine's doctrine of sovereign immunity. App. A-19. Before any evidence was taken, cross motions were filed by both parties to resolve the immunity defense. The Superior Court granted the Defendant's Motion for Judgment on the Pleadings. App. A-46. This appeal followed.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does Maine's common law doctrine of sovereign immunity bar this action?
2. Is the Supremacy Clause of the United States Constitution violated when a state court refuses to entertain a cause of action against the State expressly created by Congress in an otherwise valid statute on the grounds that a state common law doctrine of sovereign immunity bars the action?
3. Is the Supremacy Clause of the United States Constitution violated when a state court bars a federal FLSA action against the State for overtime pay while simultaneously permitting similar suits when based on state law?

ARGUMENT

Maine's statutory scheme in a myriad of circumstances makes the State amenable to damages suits in state court

ever, there is nothing to be done on the Special Master's report. There is likewise nothing to be gained by oral argument on the State's motion to dismiss. It is unfortunately a tragic consequence of the Supreme Court's inability to maintain the status of its own precedents that all this time and effort has been wasted.

Jon Mills, et al. v. State of Maine, Civil No. 92-41-P-H slip op. at 2 (D.Me. July 3, 1996) (Hornby, J.) (quotations and citations omitted).

for violating its employees' statutory rights. In this context, it is plain that the invocation of sovereign immunity does not defeat such statutory claims by state employees. Despite the State's routine exposure to state court actions and monetary judgments under Maine employment law, however, the trial court held that the State enjoys categorical immunity when its employees bring wage underpayment claims under the applicable federal statute, the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. ("FLSA").

In so ruling, the trial court ignored the limited scope of Maine's non-constitutional immunity doctrine and misread applicable federal law. The Supremacy Clause of the United States Constitution, which makes valid federal legislation the law of the land in every state court, prohibits state courts from treating state causes of action and federal causes of action differently. This command, we submit, precludes reliance on Maine's common-law sovereign immunity doctrine to shield the State of Maine from liability for failing to pay its employees the wages owed to them under the Fair Labor Standards Act. Because the decision below cannot be squared with Maine sovereign immunity principles, the U.S. Constitution, or controlling law, it must be set aside.

I. MAINE LAW AFFORDS NO BROAD, CONSTITUTIONAL SOVEREIGN IMMUNITY SHIELDING THE STATE FROM ACCOUNTABILITY

The State of Maine has traditionally been accorded certain forms of immunity by the Maine courts. The State's protection from liability, however, does not rest on the Maine Constitution. "We are not bound, as are some jurisdictions, by a constitutional provision which requires sovereign immunity." *Davies v. City of Bath*, 364 A.2d 1269, 1273 n.9 (Me. 1976).³ Rather, the Maine

doctrine of sovereign or "governmental" immunity has been developed from the archaic English law construct on the status of the Crown. See *Bale v. Ryder*, 286 A.2d 344, 345-46 (Me. 1972).

Not surprisingly, then, from the outset Maine's judge-made immunity doctrine has not furnished a comprehensive bar to claims against the State.⁴ Most to the point here, the Maine courts have recognized that, in a democratic republic, this partial immunity is continually vulnerable to erosion by the Maine legislature, which has narrowed the State's protection by enacting a wide variety of laws creating enforceable rights against the State. The legislature, in other words, is free to remove the State's protection against liability and damages, either categorically or in particular cases. *Davies*, 364 A.2d at 1271-73.

In this regard, as the Law Court has confirmed, legislative waiver of sovereign immunity may be implied from a general statutory scheme as well as from a provision expressly granting a cause of action against the State. *Indian Township Passamaquoddy Reservation Housing Authority v. Governor of the State of Maine*, 495 A.2d 1189, 1191 n.2 (Me. 1985). Accord: Opinion of the Attorney General, 1990 Me. AG LEXIS 6 (July 6, 1990) (Law Court has extended to Maine the recognized state-law doctrine of waiver by implication). As we now show, the steady aggregation of statutory enactments has all but erased Maine's sovereign immunity in the area of public

³ Although "the doctrines of sovereign immunity and municipal immunity appeared in the common law at different times and for different reasons," they stand on the same footing before the Law Court. *Davies v. City of Bath*, 364 A.2d at 1273 n.9.

⁴ For example, "invasions of private property and impairments of the use of such property which have been caused by a governmental agency traditionally have been actionable at common law despite the sovereign immunity doctrine." *Foss v. Maine Turnpike Authority*, 309 A.2d 339, 345 (Me. 1973).

employment—and with respect to state employees' wage claims in particular.

More than eighty years ago, for example, the Maine legislature enacted statutes mandating prompt payment of wages owed by the State, counties and municipalities to their workers. *Grant v. City of Saco*, 436 A.2d 403, 406 (Me. 1981) (discussing 1887 and 1911 wage payment statutes). Under the current version of that law, State employees may sue the State for their regular, agreed upon wages if they are not timely paid. 26 M.R.S.A. § 621(2). Moreover, the State is liable for the penalty of triple damages plus attorneys' fees in the event that the employee prevails. 26 M.R.S.A. § 626-A.

Additionally, the Maine legislature has imposed on the State the statutory liability for a rate of pay without regard to what the parties to the employment contract may have agreed to, and the legislature has created a right of action against the State for payment of the statutory minimum wage. 26 M.R.S.A. §§ 664, 670. The State is specifically defined as an employer subject to suit, and here again, the legislature has made the State liable for a penalty—in this instance, double damages plus attorneys' fees. 26 M.R.S.A. §§ 663(10), 670.

Maine's guarantee of employee rights as against the State itself does not stop with the dual protection afforded to State employees' wages, described above. On the contrary, the Maine legislature has established a host of additional obligations upon employers and protections for employees, both public and private, and has provided those rights and obligations in an identical fashion where the employment relationship is with the State of Maine. The Maine Whistle Blower Statute, for example, protects the employment and the wages of employees who refuse to carry out certain directives or who report certain violations of the law. 26 M.R.S.A. § 833. The State is specifically defined as an employer within the meaning of the

Act. 26 M.R.S.A. § 832(2). Thus, a state employee may bring an action against the State. 26 M.R.S.A. § 834-A. This right of action includes the right to pursue a civil lawsuit against the State for a variety of remedies, including monetary penalties.

The Family Medical Leave Act represents another protection of employment in Maine that covers both the public and private sectors. Employees are statutorily entitled to leave from work without detriment to their employment status for certain family related reasons. 26 M.R.S.A. § 844. The State, again, is specifically defined as an employer within the meaning of the Act. 26 M.R.S.A. § 843(3)(B). A State employee has a cause of action against the State for liquidated damages of up to \$100.00 per day as long as the violation occurs. 26 M.R.S.A. § 848.

The Maine Human Rights Act similarly provides protection for employment for most Maine employees. 5 M.R.S.A. § 4551 et seq. The Act provides for monetary relief in court specifically against employers, including back wages and penalties for discrimination on the basis of a variety of factors. 5 M.R.S.A. § 4553(10). The State is specifically listed as an "employer." 5 M.R.S.A. § 4553(4) and (7). Similarly, the Code of Fair Practices and Affirmative Action, 5 M.R.S.A. § 781 expressly subjects the State to judicial enforcement for failure of the State affirmatively to promote anti-discrimination. 5 M.R.S.A. §§ 781, 789-790.

The wages of State employees are again protected by the Maine Workers' Compensation Act. 39-A M.R.S.A. § 101. The State, again, is defined as an "employer" within the meaning of the Act. 39-A M.R.S.A. § 102(12). State employees may litigate various claims against the State arising out of injuries. They may also litigate claims arising out of discriminatory retaliation, whether or not any injury has occurred. 39-A M.R.S.A. § 307; § 353.

The employee can recover not only compensation for his or her injury, but also back wages and attorneys' fees for discrimination. 39-A M.R.S.A. § 353. Administrative hearings are held, and judicial enforcement is provided. Failure of the State, as employer, to make timely payments of compensation subjects the State to forfeitures of up to \$200.00 per day for non-compliance. These forfeitures may be enforced by the Superior Court in actions by state employees against their employer. 39-A M.R.S.A. § 324. Even when no injury has occurred, the employer has liabilities. For failure to purchase insurance, the employer is liable for a civil penalty of up to \$10,000.00.⁵

Thus the Maine legislature has effectively removed the State's immunity in the area delineated by the State's employment relationship with state employees. However one defines the shifting contours of sovereign immunity under current Maine law, that doctrine plainly affords the State no plausible defense against claims founded in state law, including the payment of wages owed to its own employees under Maine's own employment statutes. In holding the State immune from state employees' claims for wages owed under a federal statutory counterpart, the Superior Court disregarded the controlling history, context and limitations of Maine's common-law doctrine.

⁵ The Maine legislature has enacted still other protective laws empowering state employees, under appropriate circumstances, to file suit against the State in state court. See 26 M.R.S.A. §§ 1043(11) (A-1), 1194(3), 1194(8) (Unemployment Compensation); 26 M.R.S.A. § 979-A(5) (State Employees Labor Relations Act); 14 M.R.S.A. §§ 8103, 8104-A (Maine Tort Claims Act).

II. THE SUPREMACY CLAUSE AND FUNDAMENTAL PRINCIPLES OF FEDERALISM PROHIBIT THE STATE OF MAINE FROM ASSERTING A COMMON-LAW SOVEREIGN IMMUNITY DEFENSE AGAINST FEDERAL CAUSES OF ACTION BROUGHT IN MAINE COURTS.

The trial court erred in holding that the State of Maine executive could assert in its courts a sovereign immunity defense against claims based on a federal cause of action—the Fair Labor Standards Act—for two separate but intertwined reasons, both of which derive from the Supremacy Clause to the United States Constitution and the basic principles of federalism that inform the design of our Nation.

First, state courts are obligated to enforce federal law in their courts and may not interpose state law derived defenses that would frustrate those federal rights. This is so because federal laws enacted within Congress' authority are by virtue of the Supremacy Clause the laws of the state itself and override any contrary state laws.

Second, in Maine, the State has no sovereign immunity defense in connection with state statutory causes of action that are analogous, indeed closely related to the federal FLSA claims asserted by plaintiffs here. That being so, Maine may not discriminate against federal FLSA claims by barring access to its courts on those claims through the sovereign immunity device.

While the Superior Court thought otherwise, the Eleventh Amendment to the United States Constitution—on its face and as most recently interpreted by the Supreme Court in *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996)—does not alter these settled principles or their application to the case at hand.

A. *The Maine Courts Are Obligated to Enforce FLSA Claims Against the State.*

We first show that under the basic principles derived from the Supremacy Clause, the Maine courts are obligated to enforce federal causes of action, including those brought under the FLSA, notwithstanding any State substantive law to the contrary. We then demonstrate that the Eleventh Amendment has no application to such state court actions.

Basic Supremacy Clause principles

The Supremacy Clause makes valid federal laws “the supreme Law of the Land.” U.S. Const. Art. VI. “The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.” *Howlett v. Rose*, 496 U.S. 356, 367 (1990), quoting *Clafin v. Houseman*, 93 U.S. 130, 136-137 (1876). See also, *Testa v. Katt*, 330 U.S. 386, 390-391 (1947) (*Clafin* “repudiated the assumption that federal laws can be considered by the state as though they were laws emanating from a foreign sovereign.”)

It cannot be disputed—nor did the trial court find to the contrary that the federal law at issue here, the Fair Labor Standards Act, authorizes a private right of action against the States by their employees for back wages for asserted violations of the FLSA’s overtime or minimum wage provisions. The last twenty-five years demonstrates beyond peradventure Congress’ intention to authorize such actions in a manner that fully satisfies the Supreme Court’s require-

ment "of a clear statement by Congress to impose such liability" on the States. *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 206 (1991). Thus, following *Employees of Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279 (1973), which held that Congress had not sufficiently manifested its intention to authorize private actions against the States for monetary liability, Congress adopted the 1974 amendments to the FLSA to remove any questions about its intent. Pub. L. No. 93-259, 88 Stat. 55 (1974).

As the First Circuit recently observed, "[i]n light of this language and the history surrounding it, we agree with the other courts of appeals that have examined the FLSA's provisions and have concluded that the Act contains the necessary clear statement of congressional intent to abrogate state sovereign immunity." *Mills v. Maine*, 118 F.3d 37, 1997 U.S. App. LEXIS 16545, *7 (1st Cir. July 7, 1997).

It is equally beyond dispute that Congress' authorization of such actions—and indeed, its imposition of certain obligations upon the States in regard to the State's employees—does not run afoul of the Tenth Amendment. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976). As the *Garcia* Court held, "nothing in the overtime and minimum wage requirements of the FLSA . . . is destructive of state sovereignty or violative of any constitutional provision." 469 U.S. at 554.

Given that Congress has expressly authorized a private cause of action against the State, and expressly provided for concurrent jurisdiction in the state courts to entertain such claims, the Supremacy Clause dictates that defenses to the federal claim—even when tried in state court—are a matter of federal law. *Howlett v. Rose*, 496 U.S. at 375 ("The elements of, and the defenses to, a federal cause of action are defined by federal law.")

For that reason, the Supreme Court has held that States are not free to "redefine the federal cause of action" by seeking to exempt from liability certain defendants based on the States' "own common-law heritage." *Howlett v. Rose*, 496 U.S. at 375; *Felder v. Casey*, 487 U.S. 131, 139 (1988); *Martinez v. California*, 444 U.S. 277, 284 (1980) ("A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced."); *See also Reich v. Collins*, 513 U.S. 106, 110 (1994) (state courts must provide a remedy for state taxes collected in violation of federal law notwithstanding "the sovereign immunity States traditionally enjoy in their own courts.").⁶ The rule that state law may not define substantive defenses to federal causes of actions brought in state courts follows from the very text of the Supremacy Clause itself, which provides that the constitutional laws of the United States prevail over "any Thing in the Constitution or Laws of any State to the Contrary." U.S. Const. Art. VI, cl. 2.

The Superior Court's holding cannot be reconciled with these principles. The Supremacy Clause makes the FLSA equally the law of the State of Maine, and abrogates any common-law immunity that the State might otherwise have available against state causes of action.

B. *The State May Not Discriminate Against Federal Causes of Actions.*

The Superior Court's decision also conflicts with Supremacy Clause principles because it sanctions the state

⁶ In the absence of any remedy in state court for the vindication of a federal right, the United States Supreme Court in *Reich v. Collins*, *supra*, implied such a state court remedy: "a denial by a State Court of the recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself a violation of the Fourteenth Amendment." 502 U.S. at 549.

courts to discriminate against claims based on whether they derive from state or federal causes of action. Such discrimination has long been held contrary to our nation's basic design and the obligations imposed by the Supremacy Clause.

The Supreme Court has long read the Supremacy Clause to charge "state courts with a coordinate responsibility to enforce [federal] law according to their regular modes of procedure." *Howlett v. Rose*, 496 U.S. at 367. In this regard, it is "settled that a state may not exercise its judicial power in a manner that discriminates between analogous federal and state causes of action." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 776 n. 1 (1982) (O'Connor, J., concurring and dissenting). States must make their courts equally "available for the vindication of federal as well as state created rights." *Id.* at 769.

The principle that states may not favor state causes of action—or selectively disfavor federal causes of action—in state courts is one of long standing. In *Mondou v. New York*, 223 U.S. 1, 58 (1912) (the *Second Employers' Liability Case*), the Supreme Court held that states must hear claims in their courts brought under the Federal Employee Liability Act ("FELA") when "their jurisdiction, as prescribed by local laws, is adequate to the occasion." The Supreme Court explained that the state courts of Connecticut were required to hear the FELA causes because those courts "are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction, not only in those cases where the right of action arose under the laws of that state, but also in cases where it arose in another state, under its laws, and in circumstances in which the laws of Connecticut give no right of recovery, as where the causal negligence was that of a fellow servant." *Id.*

In short, because the state courts were generally available to hear personal injury claims, Connecticut could not close the doors of its courts to such claims brought under a federal cause of action simply because "the act of Congress is not in harmony with the policy of the state." Differences in the State's substantive law regarding negligence or personal injury did not justify closure of its courts to federal claims of the same general type or category.

The principle set forth in *Mondou* has been repeatedly reaffirmed. See, e.g., *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211 (1916) ("where the general jurisdiction conferred by the state law upon a state court embraced otherwise causes of action created by an act of Congress, it would be a violation of duty under the Constitution for the court to refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers."); *McKnett v. St. Louis & S.F. Railway Co.*, 292 U.S. 230, 233-4 (1934) ("The denial of jurisdiction by the Alabama court is based solely upon the source of law sought to be enforced. The plaintiff is cast out because he is suing to enforce a federal act. A state may not discriminate against rights arising under federal laws.")

In *Testa v. Katt*, 330 U.S. 386 (1947), the Court again restated this basic principle, making clear that a state violates this anti-discrimination principle even if the federal causes of action which the state bars from its courts are only roughly analogous to state causes of action which the state courts enforce. In *Testa*, Rhode Island courts declined to enforce triple damage provisions available under the federal Emergency Price Control Act when consumer goods were sold at prices that exceeded prescribed ceilings. In holding that the Rhode Island courts were obligated under the Supremacy Clause to hear the federal claims, the Court observed that "it is con-

ceded that this same type of claim arising under Rhode Island law would be enforced by that State's courts. Its courts have enforced claims for double damages growing out of the Fair Labor Standards Act." *Id.* at 394. Both types of claims involved liquidated damages or penal sanctions; however, apart from that similarity, in substantive terms, the claims were unrelated, one involving consumer goods, and the other employment standards. See also *F.E.R.C. v. Mississippi*, 456 U.S. at 760 ("The courts of Rhode Island refused to entertain such claims, although they heard analogous state causes of action."); see also 456 at 776, at n.1 (O'Connor, J. concurring and dissenting); *Martinez v. California*, 444 U.S. at 283, n.7 ("We note that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim.").

In *F.E.R.C. v. Mississippi*, for example, a federal act required state utility commissions to implement the federal scheme by making their procedures available to resolve disputes between different participants in the electric utility industry. The Supreme Court held that Mississippi could not seek to limit disputes before its public service commission based on whether the dispute resolution procedure was mandated by federal or state law: "In essence, then, the statute and the implementing regulations simply require the Mississippi authorities to adjudicate disputes arising under the statute. Dispute resolution of this kind is the very type of activity customarily engaged in by the Mississippi Public Service Commission." 456 U.S. at 760. The Supreme Court concluded that "we again find the principle of *Testa v. Katt*, *supra*, controlling: the State is asked only to make its administrative tribunals available for the vindication of federal as well as state-created rights." *Id.* at 769.

And just last Term, in *Printz v. U.S.*, 65 LW 4731 (June 27, 1997), the Supreme Court once again reaffirmed

the basic principle of *Testa v. Katt* and the *Second Employers Liability Cases*. Justice Scalia, writing for the majority, recognized the continuing durability of the principle stated in *Testa*—"that state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause." 65 LW at 4740; see also, 4733, at n. 1, quoting from *Mondou*, *supra*, 223 U.S. at 56-57. Indeed, Justice Scalia carefully distinguished—based on the Supremacy Clause—Congress' recognized power to require state courts to enforce state laws and from what he viewed as the novel requirement of the Brady bill which required state legislative and executive officials to carry out federal laws which were not of general applicability. *Id.*

These principles dictate that Maine cannot selectively bar claims in its courts based on the origin of the cause of action.

[T]he principle upon which the [*Second Employer's Liability Case*] rested, while not questioning the diverse governmental sources from which state and national courts drew their authority, recognized the unity of the governments, national and state, and the common fealty of all courts, both state and national, to both state and national Constitutions, and the duty resting upon them, when it was within the scope of their authority, to protect and enforce rights lawfully created, without reference to the particular government from whose exercise of lawful power the right arose." *Bombolis*, *supra*, 241 U.S. at 222-223.

Under *Testa* and the *Second Employer Liability Case*, then, the types of state causes of action against the State that Maine has opened its courts to hear are analogous to the federal claim advanced by plaintiffs here. Indeed, we need not search far and wide to find a state cause of action which Maine law permits to be maintained in the courts of the State which is analogous to the federal cause

of action at issue in this case. There are, in fact, many state causes of action that, in spite of state common law doctrine of sovereign immunity, are maintained against the State in the employment law setting. They authorize damages against the State as well as penalties and attorney's fees. See *supra* at pp. 3-6. Indeed, there are some state causes of action that are all but identical to the federal cause of action at issue. Both the Maine statute and the federal statute authorize suit against the State to recover statutorily defined minimum wages. Indeed, the State statute adopts the federal definition of minimum wage. Compare 26 M.R.S.A. § 664(1) with 29 U.S.C. § 206. Both statutes require pay for hours over 40 with Maine again adopting the federal definition.⁷ Compare 26 M.R.S.A. § 664(2) with 29 U.S.C. § 607. Both statutes create a liability for liquidated damages in addition to the wages protected: in the case of FLSA the court may, at its discretion, award double damages, whereas under the state Act double damages for the first 40 hours of work are mandatory, and triple damages are mandatory for any unpaid but contracted for compensation for hours after 40. 26 M.R.S.A. § 621(2). Both statutes authorize the payment of attorney's fees by the State to the employee's attorney in a successful suit. Compare 26 M.R.S.A. §§ 626-A, 670, with 29 U.S.C. § 216(b). The differences are minor and technical. Thus, the only meaningful basis on which to distinguish the kinds of claims that the State clearly permits to be brought against it in state court from the claims that the Superior Court in this case excluded from the court is the fact that the plaintiffs' claims here are founded on a *federal law*, while the claims that are permitted by the above statutes are founded on *state laws*. But to discriminate on this basis in the decision of

⁷ While the State statute does not impose a minimum overtime rate against the State for hours over 40, it creates a remedy for triple damages which includes any unpaid wages owed for work performed after 40 hours. 26 M.R.S.A. §§ 621(2), 626-A.

whether or not to grant a hearing on the federal claims surely offends the Supremacy Clause and the coordinate respect that states owe to the federal government under our system of dual sovereignty.

As we catalogue at great length in Part I of our brief,⁸ the immunity which the defendant asserts in this action is one defined more by its absence than its presence. Having effected waivers of sovereign immunity through the legislative creation of so many state causes of action that are analogous in character to the federal claim asserted here, the State cannot now assert that there is sovereign immunity simply because plaintiffs claim has its origin in a federal enactment.

Whatever notions of sovereign immunity may be implicit in the Eleventh Amendment, they do not include any right of the state to arbitrarily define the scope of that immunity. The sovereignty of the State is hardly swept away by permitting claims for minimum overtime to proceed where the State has already conceded that claims for minimum wages, and a host of other employment related matters, do not threaten or impair its autonomy or sovereignty. A State may retain the power "to determine . . . the character of the controversies which shall be heard in [its courts]," *McKnett, supra*, 292 U.S. at 233, but that does not mean that states may distinguish between suits of the same basic type based on whether the liability is grounded in state or federal law.

C. *The Eleventh Amendment Does Not Apply to State Court Actions*

1. Nothing in *Seminole Tribe, supra*, or the Eleventh Amendment undermines these settled principles regarding the Supremacy Clause and the obligations that it imposes on state courts.

⁸ See pp. 3-6, *supra*.

(a) In terms, the Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. Thus, the Amendment works a limitation on "the Judicial power of the United States" over certain cases and controversies, and only upon such power. In other words, the Eleventh Amendment simply has no application to state judicial power. Moreover, it is particularly to the point that nothing in the Eleventh Amendment limits Congress' Article I legislative powers or the force of the Supremacy Clause with regard to constitutional congressional enactments, or the obligation of the state courts to enforce valid federal statutes.

(b) The Supreme Court has long emphasized that, consistent with its text, the Eleventh Amendment—and the immunity from suit in federal court that it works—does not apply to suits in the state courts. See, in particular, the extensive explanation of this principle in *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 204-205 (1991) ("as we have stated on many occasions, 'the Eleventh Amendment does not apply in state courts'"). See also *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980) ("[n]o Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only '[t]he Judicial power of the United States'").⁹

And in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the Court, in upholding an Eleventh Amendment defense to federal court jurisdiction, expressly rejected the suggestion that a State that is immune from suit in federal court because of the Eleventh Amendment

⁹ Indeed, this Court has also recognized that basic principle. *Moody v. Commissioner*, 661 A.2d 156, 158 n.3 (Me. 1995).

is not subject to the federal suit in the state courts, by stating;

Justice Brennan's dissent also argues that in the absence of jurisdiction in the federal courts, the States are 'exemp[t] . . . from compliance with laws that bind every other legal actor in our Nation.' Post, at 248. This claim wholly misconceives our federal system. As Justice Marshall has noted, 'the issue is not the general immunity of the States from private suit . . . but merely the susceptibility of States to suit before *federal tribunals*.' *Employees v. Dept. of Public Health*, [411 U.S. at 293-94] (concurring in result) (emphasis added). It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land. [473 U.S. at 239-40, n.2.]

(c) *Seminole Tribe*, heavily and erroneously relied on by the Superior Court, was careful to describe its holding as limiting Congress' power to authorize suits in the federal courts: "The Eleventh Amendment prohibits Congress from making the state of Florida capable of being sued in *federal court*." 116 S.Ct. at 1133 (emphasis supplied). Nothing in the opinion suggests that the view of the Eleventh Amendment articulated there embraces any notion that Supremacy Clause does not apply where state courts are otherwise open to hear claims against States.

Indeed, the federal courts considering the issue since *Seminole* have uniformly held that, notwithstanding any Eleventh Amendment bar to federal court jurisdiction, state courts remain available and obligated to enforce private FLSA actions against the States. See, e.g., *Aaron v. Kansas*, 3 WH Cases 2d 1733, 1736-37 (10th Cir. June 17, 1997) ("Moreover, our holding today does not permit states to avoid their legal duty to comply with the wage and overtime provisions of the FLSA, nor does our hold-

ing deny recourse for a state employee denied his or her right. . . . The employee can sue in state court for money damages under the FLSA as a state court of general jurisdiction is obligated by the Supremacy Clause to enforce federal law."); *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996) ("Our holding today does not permit states to avoid their legal duty to comply with the provisions of the FLSA . . . state employees may sue in state court for money damages under the FLSA, and a state court would be obligated by the Supremacy Clause to enforce federal law.").¹⁰

For these reasons, the trial court erred, both as a matter of the Maine law of sovereign immunity itself, and under Eleventh Amendment jurisprudence, in holding that private actions based on federal claims were precluded in Maine courts whenever the Eleventh Amendment would bar such suits in federal courts. However, this Court need not reach the issue of whether Maine could interpose a sovereign immunity defense to the federal claims under hypothetical circumstances where Maine law consistently interposed state immunity to state-based causes of action. For as we have shown, Maine has waived any such defense in regard to a broad array of state causes of action, and having done so, cannot interpose that defense selectively against federal causes of action. To authorize such discrimination would be to turn the federalism concern that animates the Court's Eleventh Amendment case law on its head.

2. Maine's doctrine of sovereign immunity in state court is different from its Eleventh Amendment immunity in federal court.

¹⁰ See also *Mulverhill v. New York*, 4 WH Cases 2d 15 (N.D.N.Y. July 11, 1997); *Rehberg v. Department of Public Safety*, 946 F. Supp. 741 (S.D. Ia. 1996); *Taylor v. Virginia DOT*, 3WH Cases 2d 1196, 1996 U.S. Dist. LEXIS 19747 (E.D. Va. Dec. 18, 1996).

The court below sought to escape the controlling force of the Supremacy Clause by mischaracterizing Maine's common-law sovereign immunity doctrine as "synonymous" with the Eleventh Amendment, such that the denial of a state forum automatically follows from denial of a federal forum. The trial court did so by fundamentally misreading four decisions of this Court as dictating the reflective incorporation of every Eleventh Amendment result into the common law of Maine: *Drake v. Smith*, 390 A.2d 541 (Me. 1978); *Thiboutot v. State*, 405 A.2d 230 (Me. 1979), aff'd on other grounds, 448 U.S. 1 (1980); *Jackson v. State*, 544 A.2d 291 (Me. 1988); and *Moody v. Commissioner, Dept. of Human Services*, 661 A.2d 156 (Me. 1995). As we now show, the Law Court has not in fact equated Maine's judicial sovereign immunity doctrine to the Supreme Court's Eleventh Amendment doctrine. Rather, these cases merely elaborate Maine's existing law by drawing on the recognized rule that only federal legislation *clearly stating* a congressional intent to subject the states to liability can support a federal cause of action against a state.

Drake v. Smith, which involved an unlicensed nursing home's claim for payments from the State under a federal/state cooperative program, belies any suggestion that governmental immunity in the Maine courts under Maine common law follows automatically from Eleventh Amendment immunity in the federal courts. To the contrary, even though the Law Court in *Drake* accepted that the State could not be sued in federal court, 390 A.2d at 346, it reasoned extensively from the nature of the claimed liability and the structure of the statutory program that these enactments could not reasonably support the implication of a state-federal legislative intent to subject the State of Maine to monetary liability in its own courts.¹¹

¹¹ Thus, the Court first explained that the statutory plan put the State not in a direct contractual relationship with aid recipients

There was no hint that this court believed that state sovereign immunity followed automatically from Eleventh Amendment immunity.

Thiboutot v. State, a case involving class claims for federal welfare benefits administered by the State of Maine, is similarly devoid of any suggestion that the Eleventh Amendment provides the governing rules of Maine's own sovereign immunity law. The Law Court, rather, addressed the consequences of prior Supreme Court holdings that Congress had *not* intended to subject the States to retrospective monetary liability under 42 U.S.C. Section 1983. Thus, *Thiboutot* drew by analogy on only one narrow facet of established Eleventh Amendment law—the undisputed threshold requirement of a “clear statement” of Congressional intent to impose such liability on the states. See *Hilton, supra*, 502 U.S. at 206. Neither *Thiboutot* nor the cases it relied on decided that a state-court sovereign immunity defense trumps a federal statute embodying the requisite “clear statement.” Indeed, *Thiboutot* emphasized the significant “federalism” concerns that support a state court forum for such claims: “Adjudicating federal claims against state governments in the state courts is likely to produce less friction in federal-state relations and is consistent with the concept of federalism expounded in *Younger v. Harris*.” 405 A.2d at 235 (citations omitted).

In dealing with Maine's own sovereign immunity law, moreover, the *Thiboutot* Law Court straightforwardly ap-

or vendors, but, rather, in the role of an administrative “conduit” for federal aid. The Court further found that participation in a federal program did not necessarily imply that the State had undertaken sole responsibility to pay unlicensed vendors who were not and could not be paid with federal funds. To underscore its conclusion in this regard, the Law Court noted the anomaly of reading the same opaque statute as simultaneously accepting and rejecting that unfunded financial burden depending on whether the claim is brought in state or federal court. 390 A.2d at 546.

plied Maine's non-constitutional doctrine, as it had done in *Drake*. Thus, before examining the plaintiffs' rights under 42 U.S.C. § 1983, the Law Court analyzed the applicable state legislative and regulatory scheme to determine the extent to which they removed the State's immunity in state court.¹² To be sure, while basing its holding expressly on the *Drake* rationale, the Law Court in *Thiboutot* admittedly “fortified” its conclusion by invoking a “theme” and certain policy “considerations” underlying the Supreme Court's reluctance to afford retrospective remedies against state governments in Section 1983 cases.¹³ 405 A.2d at 237. But given the shifting rationales and extensive dicta in those cases, the Law Court ultimately focused on *Edelman v. Jordon's* narrow reading of 42 U.S.C. § 1983—that “Congress did not intend to abrogate

¹² The Law Court concluded that the state enactments afforded retrospective monetary relief only to named plaintiffs who qualified as “claimants” under state law, not to the unnamed class members who failed actively to pursue their state claims. 405 A.2d at 234. In reaching its conclusion, however, the Law Court also recognized that Maine's sovereign immunity will not defeat claims based on higher-order “property” interests, citing *Foss v. Maine Turnpike*. Specifically distinguishing welfare aid under the statutory scheme from “a property right like the right to payments under an annuity contract or the right to rent under a lease,” the Law Court found that the precedent denying immunity in property-taking cases did not control in view of “the qualified nature of welfare rights.” 405 A.2d at 234. Compare *Mercier v. Town of Fairfield*, 628 A.2d 1053, 1055-56 (Me. 1993), *Barber v. Inhabitants of the Town of Fairfield*, 460 A.2d 1001, 1007-08 (Me. 1983), and *Lovejoy v. Grant*, 434 A.2d 45, 50 (Me. 1981) (rules and understanding that secure certain benefits may give rise to property interests with respect to public employment).

¹³ In particular, the Law Court noted the “peculiar” nature of liability for retrospective welfare benefits withheld in good faith, the potentially great financial burden of unanticipated relief to a large class of individuals, who had not pursued individual claims, and the adverse impact that would result from allocating scarce welfare resources first to corrective payments at the expense of even more critical current needs. 405 A.2d at 237.

the states' sovereign immunity" when enacting this legislation. 405 A.2d at 236-37.

Ten years after *Thiboutot* the Law Court revisited the same terrain in *Jackson v. State* without adding anything new to Maine's law on sovereign immunity. As in *Thiboutot*, the *Jackson* Court duly applied federal law to decide the merits of a federal statutory claim prosecuted against the State of Maine in state court. 544 A.2d at 297-98. Like the federal civil rights statute addressed in *Thiboutot*, the Rehabilitation Act involved in *Jackson* had already been held deficient to support such a cause of action by the Supreme Court under the threshold "clear statement" test. Given the absence of Congressional intent to impose the asserted obligations on the State of Maine, the Law Court simply followed *Thiboutot*, 544 A.2d at 298-99.

Moody v. Commissioner, the most recent decision relied on by the court below, is yet another case on the theme of retrospective relief in class actions claiming welfare benefits. The Law Court again cited *Edelman v. Jordan* and *Thiboutot* in ruling that relief relating solely to retroactive payment of welfare benefits is unavailable against the State. 661 A.2d at 158-159. Indeed, the Law Court acknowledged in a footnote that the Eleventh Amendment itself "is not directly applicable to state courts." *Id.* at 158 n.3. Apart from the Eleventh Amendment, however, the Court added that the doctrine of sovereign immunity "similarly" protects the states from actions of state courts, citing *Thiboutot* and *Drake*. *Id.* That observation, unremarkable on its face, in no way expands or modifies the substance of the Maine common-law immunity doctrine in effect at the time of *Drake* and *Thiboutot*.¹⁴

¹⁴ To buttress its misreading of Maine law, the trial court relied on *Mossman v. Donahey*, 346 N.E. 2d 305 (Ohio 1976), *Weppeler v. School Board*, 311 So. 2d 409 (Fla. Dist. Ct. App. 1975), and *Morris v. Massachusetts Maritime Academy*, 565 N.E. 2d 422 (Mass. 1991). Those decisions, however, add no weight to the holding

Against this background, the court below manifestly erred in its conclusion that incorporation of "Eleventh Amendment principles" into Maine law automatically gives the State immunity against a federal claim in state court whenever a federal forum is unavailable. The trial court's failure to define the supposedly incorporated "principles" is problematic in itself. But no fair reading of the cited cases can support the unqualified assertion that the reach of Maine's sovereign immunity doctrine has expanded to incorporate by reference the outcome of every Eleventh Amendment ruling. On the contrary, the Law Court's continued citation to *Thiboutot* and *Drake* only reaffirms that Maine's own judicial doctrine of sovereign immunity, to the extent it applies, remains limited and non-constitutional in nature. Thus, no ritual invocation of "Eleventh Amendment principles" can obscure the fact that Maine legislature, through its system of state employment statutes, has already removed the State's shield against state employees' wage claims under Maine law. And nothing in Maine law empowers the courts to revive such

below. *Mossman* and *Weppeler* are irrelevant because both decisions addressed only the pre-1974 version of the FLSA, concerning which the Supreme Court had ruled in *Employees of the Department of Health & Welfare, supra*, 411 U.S. at 279, that the federal statute as it read in 1973 contained no clear statement of Congressional intent to subject the states to its requirements. As we have shown above, the 1974 FLSA amendments specifically redressed that "clear statement" deficiency; moreover, the Ohio court's confusion of Eleventh Amendment issues with Tenth Amendment concerns about burdens on the state government was subsequently disposed of by the Supreme Court's express holding in *Garcia, supra*, that the FLSA is within Congress's Constitutional power to impose on the states. *Morris* similarly involved a federal statute, the Jones Act, that had been held to lack the requisite clear statement of intent to abrogate states' immunity. The *Morris* opinion specifically distinguished the post-1974 FLSA and cited *Garcia* for the proposition that "the supremacy clause gives Congress the power to abrogate State court immunity in its [i.e. the State's] own as well as in federal courts." 565 N.E.2d at 427.

a shield selectively, so as to bar only those wage claims based on a valid federal statute.

CONCLUSION

For all the foregoing reasons, we respectfully submit that the judgment of the Superior Court must be set aside.

Dated: October 7, 1997

Respectfully submitted,

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[Certificate of Service Omitted]

STATE OF MAINE
CUMBERLAND, SS.

SUPREME JUDICIAL COURT LAW COURT

Docket No. CUM-97-446

JOHN H. ALDEN, *et al.*,
Plaintiffs-Appellants
v.

STATE OF MAINE,
Defendant-Appellee

On Appeal From The Superior Court

APPELLEE'S BRIEF

STATEMENT OF FACTS

The plaintiffs-appellants, 72 current and former probation officers, appeal from a decision of the Superior Court, Cumberland County (Calkins, J.), granting judgment on the pleadings to the defendant-appellee, State of Maine ("Maine"). On appeal, the plaintiffs allege that the court improperly held that the plaintiffs' claim for overtime under the Fair Labor Standards Act was barred by the doctrine of sovereign immunity.

The plaintiffs assert that Maine did not properly pay them overtime pursuant to section 7 of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 207. Maine has disputed that contention for years, and con-

tinues to dispute that contention. Following extensive proceedings during the past four years in federal court, which were ultimately dismissed on sovereign immunity grounds, the plaintiffs brought their dispute to state court, which likewise dismissed their claims on sovereign immunity grounds.

Plaintiffs' Federal Court Lawsuit. On December 21, 1992, the plaintiffs in this case, along with 24 other probation officers, filed their complaint in federal court, seeking overtime under the FLSA. Appendix ("App.") A38-A42. In its answer, Maine asserted affirmative defenses based, *inter alia*, on sovereign immunity, the tenth amendment, and the eleventh amendment.

On December 21, 1993, the U.S. District Court held on partial summary judgment that the plaintiffs were not entirely exempt from the overtime requirements of the FLSA, but were partially exempt as law enforcement officers. *Mills v. Maine*, 839 F. Supp. 3 (D. Me. 1993). This was not a final judgment and thus neither the plaintiffs nor Maine could appeal the portions of the decision with which they disagreed. On June 1, 1994, the district court determined on a stipulated record the method of calculating the overtime owed to the plaintiff. *Mills v. Maine*, 853 F. Supp. 551 (D. Me. 1994). Once again, this was not a final judgment, and thus neither the plaintiffs nor Maine could appeal the portions of the decision with which they disagreed.

Meanwhile, because the collective bargaining agreement made plain that the plaintiffs could receive overtime under the FLSA or a 16% non-standard premium in lieu of overtime, but not both, the result of the district court's decision that the plaintiffs were eligible for overtime under the FLSA was that, beginning on February 6, 1994, Maine began paying the plaintiffs overtime instead of the 16% non-standard premium. Ironically, the plaintiffs then sued Maine and five state officials for paying them overtime

(instead of the 16% non-standard premium), alleging that they had engaged in retaliation against them in violation of section 15(a)(3) of the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3). This claim was rejected both by this district court and by the First Circuit on the ground that Maine's action was permitted, and indeed was mandated, by the collective bargaining agreement. *Blackie v. Maine*, 888 F. Supp. 203 (D. Me. 1995), *aff'd*, 75 F.3d 716 (1st Cir. 1996).

Following the district court's decision on the method of calculating overtime, *see Mills v. Maine*, 853 F. Supp. 551 (D. Me. 1994), Maine proposed to calculate the overtime based on the attested time records the plaintiffs signed and submitted each week (reserving its appeal rights on the underlying liability decision), and five of the 96 plaintiffs agreed, resulting in stipulated decisions concerning the damages for those five plaintiffs. The vast majority of the plaintiffs, however, chose to contest the accuracy of their own time sheets, and therefore, on August 25, 1994, the district court appointed a special master to calculate the overtime. *See Mills v. Maine*, 118 F.3d 37, 41 (1st Cir. 1997).

Following extensive proceedings before the special master, including over 14 days of testimony, hundreds of pages of briefs, and countless rulings (and following agreement on the amounts for certain additional plaintiffs based on the various rulings of the special master and the district court), on December 28, 1995, and on April 16, 1996, the special master issued his reports on the remaining, unliquidated claims. Although most, but not all, of the plaintiffs were found to be entitled to some additional overtime, the special master largely rejected the plaintiff's claims. In the first report, although the plaintiffs contended that 11 of the remaining plaintiffs were owed an additional \$204,000, the special master concluded that they were only owed an additional \$4,100. In the

second report, the special master awarded less than half of the additional overtime claimed by the plaintiffs. Both the plaintiffs and Maine objected to the special master's reports, and those objections were still pending when the federal lawsuit was dismissed.

While the parties' objections to the special master's report were still pending before the district court, on March 27, 1996, the Supreme Court held that Congress did not have authority to abrogate a State's eleventh amendment immunity under the Commerce Clause. *Seminole Tribe v. Florida*, 116 S.Ct. 1114 (1996). Based on that decision, Maine moved to dismiss the federal lawsuit for lack of subject matter jurisdiction on sovereign immunity grounds. On July 3, 1996, like every one of the many federal courts that have considered the issue, the district court dismissed the plaintiffs' suit, a ruling which was subsequently affirmed on appeal by the First Circuit. *Mills v. Maine*, 1996 WL 400510 (D. Me. July 3, 1996), *aff'd*, 118 F.3d 37 (1st Cir. 1997).

Plaintiffs' State Court Lawsuit. On July 31, 1996, the plaintiffs filed the instant state court action, seeking to relitigate the overtime claims they presented to the federal court. App. A11-A13. Indeed, the plaintiffs even sought to relitigate the issues they had lost in federal court, such as the appropriate statute of limitations. Compare App. A12-13 (claiming three year statute of limitations) with *Mills v. Maine*, 853 F. Supp. at 555-56 (rejecting three year statute of limitations).

Following several amendments to the complaint to add additional plaintiffs, App. A24-A28, A48-A52, on December 18, 1996, the plaintiffs moved to strike two of Maine's affirmative defenses, namely, sovereign immunity and the statute of limitations. App. A31-A44. On February 4, 1997, Maine filed a motion for judgment on the pleadings based on the same two defenses. App. A45. The United States Secretary of Labor was then granted leave to participate as *amicus curiae*. App. A47.

Following extensive oral argument, on July 18, 1997, the Superior Court, like every other state court that has considered this issue since *Seminole Tribe*, held that the plaintiff's FLSA claims were barred in state court by the doctrine of sovereign immunity. App. A57-A68. This appeal followed. App. A69.

STATEMENT OF ISSUES

1. Should this court reject the plaintiffs' new argument on appeal that the Legislature waived Maine's sovereign immunity for FLSA overtime claims?
2. Did the court below properly hold that the plaintiffs' FLSA overtime claims were barred by the doctrine of sovereign immunity?

SUMMARY OF ARGUMENT

The plaintiffs argue first that the Legislature waived Maine's sovereign immunity for FLSA overtime claims by passing numerous statutes expressly waiving Maine's sovereign immunity. This argument should be rejected out-of-hand because the plaintiffs did not even allude to this theory in the Superior Court. Moreover, the Legislature has expressly not waived Maine's sovereign immunity for overtime claims. Indeed, this new argument on appeal simply underscores Maine's contention that, absent an express legislative waiver, Maine retains its sovereign immunity, which is "one of the highest attributes inherent in the nature of sovereignty." *Drake v. Smith*, 390 A.2d 541, 543 (Me. 1978).

The plaintiffs then argue that Maine cannot interpose sovereign immunity as a defense to a federal cause of action. This argument flies in the face of over 20 years of decisions from this court. Moreover, the critical issue is not whether Congress intended to subject States to suit in their own courts, but rather whether Congress has the power to do so. As the Supreme Court has now held, Congress lacks the power to abrogate State sovereign

immunity under the Commerce Clause. The plaintiffs cannot sue Maine for FLSA damages in either federal or state court.

ARGUMENT

I. THIS COURT SHOULD REJECT THE PLAINTIFFS' NEW ARGUMENT ON APPEAL THAT THE LEGISLATURE WAIVED MAINE'S SOVEREIGN IMMUNITY FOR FLSA CLAIMS.

The plaintiffs argue that the Legislature waived Maine's sovereign immunity for FLSA claims by enacting various statutes governing wages and by enacting numerous other statutory waivers of sovereign immunity. *See* Appellants' Brief at 5-9. This court need not even address the merits because this argument was never raised in the court below, and it is well established that this court will not consider new arguments on appeal.

In the court below, the plaintiffs argued only that Maine could not assert a sovereign immunity defense in the face of the Supremacy Clause. *See* App. A32-A34. The plaintiffs did not cite any state statutes governing wages, much less argue that they were applicable. On the contrary, the plaintiffs argued that their FLSA claims were not barred by the statute of limitations because they were simply asserting the same claim they had asserted in federal court, *i.e.*, a federal FLSA overtime claim (as opposed to a state overtime claim). *See* App. A34-A36.

Likewise, the plaintiffs did not cite any other statutory waiver to assert that the Legislature had somehow waived Maine's sovereign immunity for overtime claims. On the contrary, Maine argued in the court below that the Legislature had expressly refused to waive Maine's sovereign immunity for overtime claims. *See* 26 M.R.S.A. § 664 (3)(D). The plaintiffs' failure to respond to this argument in the Superior Court is even more telling.

This Court recently reiterated that "a party is bound on appeal by its strategy at trial." *Townsend v. Chute*

Chemical Co., 1997 ME 46, ¶ 11,691 A.2d 199, 203. This means that this court will not consider a new argument on appeal. *Poire v. Manchester*, 508 A.2d 1160, 1164 (Me. 1986).

Specifically, proper appellate practice will not allow a party to shift his ground on appeal and come up with new theories after being unsuccessful on the theory presented in the trial court. It is a well settled universal rule of appellate procedure that a case will not be reviewed by an appellate court on a theory different from that on which it was tried in the court below.

Teel v. Corson, 396 A.2d 529, 534 (Me. 1978) (citation omitted); *accord Morris v. Resolution Trust Co.*, 622 A.2d 708, 714 (Me. 1993) ("well established" that a party is held to have waived new issue on appeal); *Berner v. Delahanty*, 1997 WL 6590112, No. 96-2122, slip. op. at 21 n.8 (1st Cir. Oct. 28, 1997) (appellant "has forfeited his right to argue a new, much different theory on appeal") (citations omitted).

It is irrelevant whether or not the new issue on appeal is a constitutional issue:

No principle is better settled than that a party who raises an issue for the first time on appeal will be deemed to have waived the issue, even if the issue is one of constitutional law.

Cyr v. Cyr, 432 A.2d 793, 797 (Me. 1981) (citations omitted).

Applying this standard, this court should reject out-of-hand the plaintiffs' newly minted argument that the Legislature somehow waived Maine's sovereign immunity for overtime claims. In any event, on the merits, the plaintiffs are wrong.

The plaintiffs argue that Maine has waived its sovereign immunity for various wage claims. *See* Appellants' Brief

at 6-7. None of these authorities remotely support the plaintiffs' contention that the Legislature has waived Maine's sovereign immunity for federal FLSA overtime claims. Although the plaintiffs argue that "[m]ore than eighty years ago, * * * the Maine legislature enacted statutes mandating prompt payment of wages owed by the State, counties, and municipalities to their workers[.]" Appellants' Brief at 6, the cited statutes did not even apply to the State, and the cited case held, applying the plain language of the statute, that teachers were *not* subject to these statutes. See *Grant v. Saco*, 436 A.2d 403, 406 (Me. 1981) (quoting statutes).

The plaintiffs rely on a statute that permits State employees to sue for their regular, agreed upon wages if they are not timely paid. See Appellants' Brief at 6 (citing 26 M.R.S.A. § 626-A). In this case, however, the plaintiffs received their regular, agreed upon wages, which included a 16% non-standard premium in lieu of overtime—and which paid them more money than overtime. See generally *Blackie v. Maine*, 75 F.3d 716 (1st Cir. 1996). The plaintiffs also rely on the state statutory minimum wage, see Appellant' Brief at 6-7 (citing 26 M.R.S.A. §§ 664, 670), but the plaintiffs—who earn over \$15.00 an hour—do not, and cannot, contend that this statute was violated in this case.

The plaintiffs studiously ignore the only wage statute that is even arguably relevant in this lawsuit, namely, the state statute governing overtime claims. 26 M.R.S.A. § 664(3). In that statute, however, the Legislature expressly stated that the overtime provisions do not apply to "public employees," 26 M.R.S.A. § 664(3)(D), which are defined to include State employees such as the plaintiffs, 26 M.R.S.A. § 663(10). Thus, it is beyond debate that the Legislature has not waived Maine's sovereign immunity for overtime claims.

The plaintiffs rely on a number of other statutes that purportedly waive Maine's sovereign immunity, none of

which have anything to do with wages, much less overtime claims. See Appellants' Brief at 7-9. Although irrelevant, these statutes reinforce the conclusion that an express legislative waiver is necessary before a court can conclude that Maine has waived its sovereign immunity. Otherwise, these statutory waivers would be superfluous.

This Court regards the immunity from suit "as one of the highest attributes inherent in the nature of sovereignty" and accordingly, it has said that, generally, a specific authority conferred by an enactment of the legislature is requisite if the sovereign is to be taken as having shed the protective mantle of immunity. See *Drake v. Smith*, [390 A.2d 541, 543 (Me. 1978)].

Cushing v. Cohen, 420 A.2d 919, 923 (Me. 1980), appeal after remand sub nom. *Cushing v. State*, 434 A.2d 486 (Me. 1981). Furthermore, express statutory waivers to the general rule of sovereign immunity must be narrowly construed. See, e.g., *Hodgdon v. State*, 500 A.2d 621, 624 (Me. 1985).

Stated differently, we begin with the general rule of sovereign immunity, which must be waived expressly by the Legislature, and then, any such waivers must be construed narrowly. In this case, the plaintiffs never even overcome the general rule of sovereign immunity since there was no express waiver in this case.

II. THE SUPERIOR COURT PROPERLY HELD THAT THE PLAINTIFFS' FLSA CLAIMS WERE BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY.

The plaintiffs argue that under the Supremacy Clause, Maine cannot interpose a sovereign immunity defense to a federal FLSA claim. See Appellants' Brief at 9-30. The Superior Court, however, properly held otherwise.

First, as the Superior Court noted, this court has held on four occasions over the past 20 years that "if a plaintiff can't seek damages against the state for violations of federal law in federal court, the plaintiff can't seek damages in state court either," and thus, these "Maine cases compel a ruling in this action that the plaintiffs are barred by the doctrine of sovereign immunity from collecting damages from Maine in this case." App. A64, A67-A68 (decision below).

Second, the plaintiffs' Supremacy Clause argument must be rejected following *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996):

The Supremacy Clause argument would be persuasive but for the fact that it can only be applicable where the federal legislation is authorized. We now know that Congress does not have the power to abrogate Eleventh Amendment immunity, except when acting pursuant to the Fourteenth Amendment, and FLSA was not enacted under the Fourteenth Amendment. Thus, Congress did not have the power under the Commerce Clause to abrogate Eleventh Amendment immunity and because state sovereign immunity is synonymous with Eleventh Amendment immunity, Congress did not have the power to abrogate the immunity of states to be sued for damages in their own courts, without their consent. Therefore, the Supremacy Clause does not come into play.

App. A67 (decision below) (citing *Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997)). We consider each argument in turn.

A. The Plaintiffs' FLSA Damage Claims Are Barred By Controlling Law Court Sovereign Immunity Decisions.

In 1996, the Supreme Court held that Congress does not have the power to abrogate State sovereign immunity

under the eleventh amendment when it enacts legislation pursuant to Article I of the United States Constitution. *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996). The First Circuit, in this case, like every other federal court that has addressed the issue since *Seminole Tribe*, then concluded that the Fair Labor Standards Act was passed pursuant to Article I, and thus Congress lacked the power under the eleventh amendment to abrogate State sovereign immunity in federal court. *Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997); see also *Aaron v. Kansas*, 115 F.3d 813, 817 (10th Cir. 1997) (collecting cases). Thereafter, the Superior Court, in this case, like every other state court that has addressed the issue since *Seminole Tribe*, concluded that the eleventh amendment jurisprudence should also be applied in state court, and thus, if Congress did not have the power to abrogate State sovereign immunity in federal court for FLSA actions, it likewise did not have the power to abrogate State sovereign immunity for FLSA actions in state court. App. A61-A68; see also Addendum (collecting cases from Arkansas, Wisconsin, and Maryland).

In reaching this result, the Superior Court relied upon an unbroken line of Law Court decisions over the past 20 years. The plaintiffs now contend that these Law Court precedents do not support the invocation of sovereign immunity in this case. See Appellants' Brief at 24-30. As the court below found, however, the plaintiffs have simply misread these decisions. See App. A61-A64.

On four occasions, this court has addressed the issue whether plaintiffs could obtain retroactive money damages against Maine in state court under a federal statute when Maine was immune from such claims in federal court, and this court has uniformly held that such claims are precluded by Maine's sovereign immunity. See *Drake v. Smith*, 390 A.2d 541, 542-44 (Me. 1978); *Thiboutot v. State*, 405 A.2d 230, 232-37 (Me. 1979), *aff'd on other grounds*, 448 U.S. 1 (1980); *Jackson v. State*, 544 A.2d 291, 298-99 (Me. 1988), *cert. denied*, 491 U.S. 904 (1989);

Moody v. Commissioner, Department of Human Services, 661 A.2d 156, 158-59 (Me. 1995). In each case, this court looked to eleventh amendment jurisprudence to determine whether sovereign immunity barred the plaintiffs' claims, and after noting that the plaintiffs could not obtain the requested relief in federal court, likewise concluded that the plaintiffs could not obtain the requested relief in state court. In each case, this court sought to avoid the anomalous result advocated by the plaintiffs—that the only forum for enforcement of a federal statute would be a state court.

In *Drake v. Smith*, 390 A.2d 541 (Me. 1978), this court began with the observation that "[t]he immunity of the sovereign from suit is one of the highest attributes inherent in the nature of sovereignty. *Id.* at 543 (citations omitted). In evaluating the plaintiffs' claim for nursing home payments under a cooperative federal welfare program, this court noted "the State's immunity * * * as protected by the 11th Amendment" in federal court before concluding that the State likewise must be immune from such suits in state court. *Id.* at 546 (citing *Edelman v. Jordan*, 415 U.S. 651 (1974) (eleventh amendment precludes federal damage actions against States for violating federal welfare laws)).

The plaintiffs attempt to distinguish *Drake* on the grounds that the case only concerned Congress' intention to abrogate State sovereign immunity. See Appellants' Brief at 25-26. This misreads the import of this decision. Since Congress has the authority to abrogate state sovereign immunity under section 5 of the fourteenth amendment (the source of the federal welfare laws), but not under the Commerce Clause (the source of the FLSA), see *Seminole Tribe*, 116 S. Ct. At 1228; *Mills v. Maine*, 118 F.3d 37, 42-49 (1st Cir. 1997); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 454 (1976), Congress' intent to abrogate sovereign immunity was the dispositive factor in *Drake*. However, the critical point is that this court relied upon the Supreme Court's eleventh amendment analysis

to determine that in cases in which States are immune from monetary awards in federal court under the eleventh amendment, the State of Maine is likewise immune from such suits in state court:

The [Law Court] held that because the Maine Legislature had not waived the Eleventh Amendment immunity of the state to be sued in federal court for violations of the welfare program, it was not reasonable to believe that the Legislature had waived sovereign immunity protection in the state courts.

App. A62 (decision below) (citing *Drake*, 390 A.2d at 546).

In *Thiboutot v. State*, 405 A.2d 230, 232-37 (Me. 1979), *aff'd on other grounds*, 448 U.S. 1 (1980), a case involving federal welfare benefits, the Law Court, "[r]elying upon Supreme Court cases which held that the Eleventh Amendment barred recovery of retroactive benefits against a state in federal court, held that state sovereign immunity likewise barred the award of retroactive benefits in state court." App. A62 (decision below) (citing *Thiboutot*, 405 A.2d at 236-37).

The appellant seeks to have defendant State of Maine adjudicated liable to pay money to the members of the class in the form of retroactive AFDC-benefits. The sovereign immunity of the State of Maine precludes such a judgment unless the state has given its consent to be sued.

Thiboutot, 405 A.2d at 232-33 (Me. 1979).

The plaintiffs attempt to distinguish *Thiboutot* on the grounds that it only involved Congress' intention to abrogate State sovereign immunity. See Appellants' Brief at 26. Once again, this is unavailing on the fundamental point that *Thiboutot* construed State sovereign immunity as congruent with eleventh amendment immunity. The plaintiffs then simply dismiss *Thiboutot* as *dicta*, which is mere wishful thinking.

These cases are scarcely the vestiges of a bygone era. On the contrary, this court subsequently rejected on sovereign immunity grounds a claim for damages under section 504 of the federal Rehabilitation Act, noting that in *Thiboutot*, "[w]e stated '[t]hough the question is not free from doubt, it is our conclusion that, in the absence of waiver by the state of its sovereign immunity, the state may constitutionally interpose that immunity as a bar * * *.'" *Jackson v. State*, 544 A.2d 291, 298 (Me. 1988), cert. denied, 491 U.S. 904 (1989) (quoting *Thiboutot*, 405 A.2d at 237, and other citations omitted) (ellipsis added by court and brackets altered). "The Law Court relied upon *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), in which the Supreme Court had held that states were immune from suit in federal court for violations of the Rehabilitation Act." App. A63 (decision below); see *Jackson*, 544 A.2d at 298-99. Under those circumstances, this court saw no reason to depart from the conclusion in *Thiboutot* that sovereign immunity also prohibited such suits in state court. *Jackson*, 544 A.2d at 299.

As before, the plaintiffs' only response is to claim that Congress had not clearly expressed its intent to abrogate State sovereign immunity when it enacted the Rehabilitation Act. See Appellants' Brief at 27. This is unavailing once again since no one questioned the power of Congress to abrogate State sovereign immunity under the Rehabilitation Act, which was passed pursuant to section 5 of the fourteenth amendment. The plaintiffs consistently miss the point that this court has traditionally relied upon eleventh amendment jurisprudence to determine that, in cases in which Maine is immune from suit in federal court, Maine should also be immune from suit in state court.

This court recently revisited this issue in *Moody v. Commissioner, Department of Human Services*, 661 A.2d 156 (Me. 1995). This court again held that retroactive

monetary relief under federal law was barred by sovereign immunity in state court. After noting that a federal court had held the exact same relief sought by the plaintiffs in a companion case was prohibited by the eleventh amendment, see *id.* at 157 n.1 (citing *Doucette v. Ives*, 947 F.2d 21 (1st Cir. 1991)), this court made clear that relief which is prohibited in federal court by the eleventh amendment is also prohibited by sovereign immunity in state court:

The Eleventh Amendment to the United States Constitution precludes the federal courts from circumventing the sovereign immunity of the states. Although the Eleventh Amendment is not directly applicable to state courts, the doctrine of sovereign immunity similarly protects the states from actions of state courts.

Moody, 661 A.2d at 158 n.3 (citing *Thiboutot*, 405 A.2d at 236-37; *Drake v. Smith*, 390 A.2d 541 (Me. 1978)).

The plaintiffs do not attempt to distinguish *Moody*, arguing only that it "in no way expands or modifies the substance of the Maine common-law immunity doctrine in effect at the time of *Drake* and *Thiboutot*." Appellants' Brief at 28-29 (footnote omitted). We agree that *Moody* did not expand or modify Maine's sovereign immunity—on the contrary, it merely reaffirmed the conclusion that Maine is immune from a damages action in state court if it is also immune from such an action in federal court. In sum,

[t]hese four Maine cases make it apparent that in Maine the doctrine of state sovereign immunity has incorporated the principles of Eleventh Amendment immunity. Simply put, if a plaintiff can't seek damages against the state for violations of federal law in federal court, the plaintiff can't seek damages in state court either.

App. A64 (decision below).

We note that the law from state courts elsewhere confirms this conclusion. In several cases decided prior to *Seminole Tribe*, courts confronted the issue whether plaintiffs, who were prohibited by the eleventh amendment from seeking monetary relief in federal court, were also prohibited by sovereign immunity from seeking monetary relief in state court. Surveying the caselaw, the Massachusetts Supreme Judicial Court (whose decisions this court frequently finds persuasive, *see, e.g., Bell v. Wells*, 557 A.2d 168, 175 (Me. 1989); *State v. Knowles*, 371 A.2d 624, 628 (Me. 1977)) noted that state courts have almost always concluded that plaintiffs who are prohibited by the eleventh amendment from seeking relief in federal court, are also prohibited by State sovereign immunity from seeking such relief in state court. *See Morris v. Massachusetts Maritime Academy*, 409 Mass. 179, 185-86, 565 N.E.2d 422, 427 (1991) (collecting cases).

As the Massachusetts Supreme Judicial Court demonstrated, the history and purpose of the eleventh amendment can only be effectuated if the court concludes that private damages actions are forbidden in both state and federal courts. After discussing the history of eleventh amendment jurisprudence, the court explained why sovereign immunity applies with equal force in state and federal court:

The only logical interpretation of this implicit constitutional principle [that States would retain their sovereign immunity] is that it must apply regardless of the court in which the State is being sued. Any conclusion to the contrary would decimate the force of the Eleventh Amendment and demote it into nothing more than a choice of forum clause: either the State must consent to be sued in Federal court or it will be unwillingly subjected to process in its own courts. We think that the Supreme Court's Eleventh Amendment jurisprudence demonstrates a greater respect for the principle of State sovereign immunity.

Although concerns for Federal-State comity—the unseemly notion of one sovereign being hauled into the courts of another—arise in many Eleventh Amendment cases, those federalism concerns are no less present in this type of case. Although here it is not a question of a State being hauled into the courts of another sovereign, it is a question of a State being hauled into its own courts by the laws of another sovereign. Moreover, those laws are alleged to require the payment of retroactive damage awards out of a State's coffers. If there is any area of State sovereignty which the Supreme Court is particularly hesitant to invade, it is State citizens' settled decisions about State budgetary allocations.

Morris v. Massachusetts Maritime Academy, 409 Mass. at 185, 565 N.E.2d at 426 (emphasis in original and citations omitted).

The plaintiffs again attempt to distinguish *Morris* on the grounds that this case concerned Congress' intention to abrogate State sovereign immunity. *See Appellants' Brief* at 29 n.14. The court below, however, observed that although the precise holding was modified by subsequent developments, the proposition "that states look to Eleventh Amendment law to elucidate the states' sovereign immunity law[] was not disturbed." App. A65 (decision below).

State courts have previously addressed the issue whether individuals could sue for past FLSA overtime in state court when they could not sue for such overtime in federal court. In 1966, Congress expanded the coverage of the FLSA to include for the first time some public employers, and in *Maryland v. Wirtz*, 392 U.S. 183 (1968), the Court held that the FLSA could constitutionally be applied to States. However, the Court subsequently held that Congress had not abrogated the States' eleventh amendment immunity in the FLSA from private suits brought in federal court. *Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279 (1973).

Although this decision was largely overturned by the Fair Labor Standards Amendments of 1974 (which, in turn, has largely been invalidated vis-à-vis States in cases such as *Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997)), state courts addressed claims for past FLSA overtime during the period in the mid-1970's when such claims for past overtime could not be brought in federal court.

Based on the "logic" of the Supreme Court's decision, since the eleventh amendment barred private suits for past FLSA overtime in federal courts, Florida concluded that sovereign immunity also barred private suits for past FLSA overtime in state courts. *Weppeler v. Dade County School Board*, 311 So.2d 409, 410 (Fla. App. 1975). Likewise, in a lengthy and carefully reasoned opinion, Ohio also concluded that since the eleventh amendment prohibited private actions against States in federal court, sovereign immunity likewise prohibited private actions against States in state courts. *Mossman v. Donahey*, 46 Ohio St.2d 1, 346 N.E.2d 305 (1976).

After a lengthy survey of eleventh amendment and sovereign immunity jurisprudence, see 346 N.E.2d at 308-15, because "the reasoning and purpose of the Eleventh Amendment applied to suits in state court[.]" App. A65 (decision below), the Ohio court concluded that "under the Eleventh Amendment * * * a state may not be sued for damages by an individual under federal law, without its consent, and * * * this principle applies equally to state as well as federal courts." 346 N.E.2d at 315 (ellipsis added and footnote omitted). "[S]tate sovereign immunity is a right of constitutional proportions, whether it is considered to derive from the plan of the Constitution, or from the Eleventh Amendment[.]" *Id.* at 312 (quoted in App. A65 (decision below)).

Following *Seminole Tribe*, state courts have once again confronted the issue whether plaintiffs, who cannot sue States for past FLSA damages in federal court, may never-

theless sue States for past FLSA damages in state court. As the appended decisions from Arkansas, Wisconsin, and Maryland make clear, the uniform answer has been that plaintiffs cannot sue States for FLSA damages in either federal or state court.

In Arkansas, the court summarily dismissed the FLSA claim without an opinion. *Jacoby v. Arkansas Department of Education*, No. CV-96-7731 (Ark. Cir. Ct., Nov. 26, 1996). In Wisconsin, the court explained that it would be peculiar to preclude plaintiffs from filing suit under a federal statute in federal court while permitting plaintiffs to file such claims in state court:

The *Seminole Tribe* court held that this clause fails to give Congress the constitutional authority to abrogate a state's Eleventh Amendment immunity from suit. In my opinion, it follows that the Commerce Clause also fails to give Congress the authority to abrogate Wisconsin's constitutional immunity from suit in state court. Therefore, the State may not be sued in either federal or state court under the FLSA without its consent.

German v. Wisconsin Department of Transportation, No. 96-CV-1261, slip. op. at 5 (Wis. Cir. Ct., March 11, 1997). In a footnote to this holding, the Wisconsin court observed further that:

It would be anomalous if the "states rights" justices who authored *Seminole Tribe*, and who had vigorously dissented in [*Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)], acted to uphold states' Eleventh Amendment immunity from suit but, at the same time, affirmed congressional authority to overcome a state's own sovereign immunity under its state constitution.

German, slip op. at 5 n.5.

In Maryland, the court agreed with Wisconsin and the Main Superior Court that, following *Seminole Tribe*, plaintiffs cannot file FLSA damage actions against States in either federal or state court:

The Court in *Seminole Tribe* speaks of the Eleventh Amendment as though it were synonymous with the common law sovereign immunity, and this court agrees with that premise. "[E]ach state is a sovereign * * * and * * * [i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe*, 116 S. Ct. at 1122 (citations omitted and quotation marks omitted). Although there are other views on the subject of sovereign immunity as illustrated by the dissents in *Seminole Tribe*, it is rational for this court to continue to apply Eleventh Amendment principles to state common-law sovereign immunity.

Bunch v. Robinson, No. 97006017, slip op. at 7 (Md. Cir. Ct., Sept. 11, 1997) (brackets and ellipses in original).

Quite simply, following *Seminole Tribe*, in state court (which must actually address this issue instead of issuing gratuitous *dicta* unlike the lower federal courts discussed below), it is beyond debate that Congress does not have authority under the Commerce Clause to abrogate State sovereign immunity in state court. In short, "Congress could not, in view of the Eleventh Amendment of the United States Constitution, overrule a State's claimed sovereign immunity from suit in Federal or State courts." *Brown v. State*, 89 N.Y.2d 172, 195, 674 N.E.2d 1129, 1143, 652 N.Y.S.2d 233, 237 (1996) (citations omitted). We now turn to the plaintiffs' argument that this result is inconsistent with controlling Supreme Court decisions.

B. The Plaintiffs' FLSA Damage Claims Are Barred By Controlling Supreme Court Sovereign Immunity Decisions.

The plaintiffs contend that, under the Supremacy Clause, Maine cannot assert its sovereign immunity in state court because Congress authorized FLSA suits against States in state court. See Appellants' Brief at 10-21. Congress, of course, also authorized FLSA suits against states in federal court, and the plaintiffs concede *sub silentio* that following *Seminole Tribe*, that Congress lacks the power to authorize such FLSA suits in federal court. Indeed, the plaintiffs open their argument with the observation that "[t]he Supremacy Clause makes *valid* federal laws 'the supreme Law of the Land.'" Appellants' Brief at 11 (quoting Supremacy Clause) (emphasis added). The issue, then, is not the *intention* of Congress to abrogate state sovereign immunity, but rather the *power* of Congress to abrogate such immunity.

"As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (emphasis added) (interpreting the Supremacy Clause).

When the federal government acts within its constitutional authority, it is empowered to preempt state laws to the extent it believes such action to be necessary to achieve its purposes.

Wabash Valley Power Association v. Rural Electrification Administration, 988 F.2d 1480, 1485 (7th Cir. 1993) (emphasis added) (rejecting Supremacy Clause claim because of lack of authority for preemptive federal regulations).

In our "system of dual sovereignty between the States and the Federal Government[.]" *Gregory v. Ashcroft*, 501 U.S. at 457, it is important to remember that "[t]he

Constitution created a Federal Government of limited powers." *Id.*

The States thus retain substantial authority under our constitutional system. As James Madison put it: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which remain in the State governments are numerous and indefinite. * * * The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

Id. at 457-58 (ellipsis added by Court) (quoting The Federalist No. 45, at 292-93 (J. Madison) (C. Rossiter ed. 1961)).

It is incontestable that the Constitution established a system of "dual sovereignty." *Gregory v. Ashcroft*, 501 U.S. [at 457]; *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Although the States surrendered many of their powers to the new Federal Government, they retained "a residual and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison) [(C. Rossiter ed. 1961)].

Printz v. United States, 117 S. Ct. 2365, 2376 (1997).

The plaintiffs, therefore, must demonstrate that Congress was acting within its constitutional authority when it purported to abrogate a State's sovereign immunity in state courts. The plaintiffs do not even attempt to demonstrate that Congress, acting under its Commerce Clause powers, has such constitutional authority.

In determining whether Congress has authority under the Commerce Clause to abrogate a State's sovereign immunity from suit in its own courts, we return to *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), a case that is almost completely ignored by the plaintiffs. The *Seminole Tribe*

Court made plain that "blind reliance upon the text of the Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of.'" *Id.* at 1130 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 326 (1934); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)). Indeed, the eleventh amendment "stand[s] not so much for what it says, but for the presupposition * * * which it confirms." *Seminole Tribe*, 116 S. Ct. at 1122 (ellipsis added by Court) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)).

That presupposition [of State sovereign immunity], first observed over a century ago in *Hans v. Louisiana*, 134 U.S. 1 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."

Seminole Tribe, 116 S. Ct. at 1122 (emphasis deleted by the Court) (quoting *Hans v. Louisiana*, 134 U.S. at 13; The Federalist No. 81, at 506 (A. Hamilton) (C. Rossiter ed. 1961)). The Supreme Court has long relied upon the emphatic view of Alexander Hamilton, the "most nationalistic of all nationalists in his interpretation of the clauses of our federal Constitution," *Printz v. United States*, 117 S. Ct. at 2375 n.9 (quotation omitted), that not only was State sovereign immunity inherent in the concept of sovereignty, but that it was unaffected by the adoption of the Constitution:

This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal.

The Federalist No. 81, at 506 (A. Hamilton) (C. Rossiter ed. 1961) (quoted in *Monaco v. Mississippi*, 292 U.S. at 324; *Hans v. Louisiana*, 134 U.S. at 13). Likewise, future Chief Justice Marshall argued that “[i]t is not rational to suppose that the sovereign power should be dragged before a court.” 3 J. Elliott, *Debates on the Federal Constitution*, 555 (2d ed. 1863) (quoted in *Hans v. Louisiana*, 134 U.S. at 14). James Madison similarly observed that “[i]t is not in the power of individuals to call any state into court.” 3 J. Elliott, *supra*, 67 (quoted in *Seminole Tribe*, 116 S. Ct. at 1130 n.12).

It is beyond dispute that at the time of the adoption of the Constitution, States were immune from suit from their own citizens in their own courts. “The suability of a State without its consent was a thing unknown to the law. This has been so often laid down by courts and jurists that it is hardly necessary to be formally asserted.” *Hans v. Louisiana*, 134 U.S. at 16.

Although the Supreme Court concluded in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), that the Constitution altered this balance to permit suits against States in federal court, that decision created such a “shock of surprise” that it was immediately overruled by the eleventh amendment. *Hans v. Louisiana*, 134 U.S. at 11; *accord Seminole Tribe*, 116 S. Ct. at 1130. The eleventh amendment was designed to reaffirm the traditional notion of State sovereign immunity by eliminating the only extant exception to that immunity, *Chisholm v. Georgia*—thus, the eleventh amendment “did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits.” *Seminole Tribe*, 116 S. Ct. at 1130.

This has certainly been the understanding of the eleventh amendment and State sovereign immunity for over a hundred years. “For over a century, we have

grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment.” *Id.* at 1129. “No sovereign State is liable to be sued without her consent.” *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 321 (1838) (quoted in *Hans v. Louisiana*, 134 U.S. at 16).

It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as a defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution.

Cunningham v. Macon & Brunswick Railroad, 109 U.S. 446, 451 (1884) (emphasis added) (quoted in *Hans v. Louisiana*, 134 U.S. at 17).

It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals or by another State.

Beers v. Alabama, 61 U.S. (20 How.) 527, 529 (1858) (emphasis added) (quoted in *Hans v. Louisiana*, 134 U.S. at 17, and quoted in part in *Seminole Tribe*, 116 S. Ct. at 1130); *see also Ex parte New York*, 256 U.S. 490, 497 (1921) (eleventh amendment is “but an exemplification” of the fundamental rule of sovereign immunity that “a State cannot be sued without its consent”) (quoted in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984)).

In brief, “[t]he Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity.” *Seminole Tribe*, 116 S. Ct. at 1122 (quoting *Puerto Rico*

Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)); see also *In re Ayers*, 123 U.S. 443, 505 (1887) ("The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.") (quoted in *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. at 146). "Behind the words of the constitutional provisions are postulates which limit and control. * * * There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention." *Monaco v. Mississippi*, 292 U.S. at 322-23 (citation and footnote omitted) (quoted in *Seminole Tribe*, 116 S. Ct. at 1129).

Applying these principles, the *Seminole Tribe* Court addressed the issue of Congress' power under the Commerce Clause:

It is true that we have not had occasion previously to apply established Eleventh Amendment principles to the question whether Congress has the power to abrogate state sovereign immunity (save in *Union Gas*). But consideration of that question must proceed with fidelity to this century-old doctrine.

Seminole Tribe, 116 S. Ct. at 1129.

Throughout its opinion, as in the passage quoted immediately above, the Court broadly framed the question as whether Congress had the power under the Commerce Clause "to abrogate the States' sovereign immunity," *id.* at 1124 (emphasis added), not the more limited question whether Congress had the power to abrogate the States' eleventh amendment immunity in federal court. See generally, *id.* at 1125-31 (discussing issue as relating to "state sovereign immunity" generally, not immunity from suit in federal court).

After surveying many of the authorities quoted above, the Court concluded that States did not surrender their

sovereign immunity in the plan of the convention when the Commerce Clause was adopted as part of the Constitution:

In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.

Seminole Tribe, 116 S. Ct. at 1131 (footnote omitted).

The Court specifically addressed the argument that States could ignore applicable federal law if Congress did not have authority to abrogate state sovereign immunity:

This argument wholly disregards other methods on ensuring compliance with federal law: the Federal Government can bring suit in federal court against a State; an individual can bring suit against a state official in order to ensure that the official's conduct is in compliance with federal law; and *this Court is empowered to review a question of federal law arising from a state court decision where a State has consented to suit.*

Seminole Tribe, 116 S.Ct. at 1131 n.14 (citations omitted and emphasis added). Significantly, the Court did *not* state that Congress had authority under the Commerce Clause to abrogate a State's sovereign immunity from suit in its own courts.

None of the alternatives contemplated by the *Seminole Tribe* Court are present in this case. First, the United States Secretary of Labor has never investigated the plaintiffs' claims in this case, much less filed suit. Second, the

plaintiffs have not sought a prospective injunction against the Maine Commissioner of Corrections, as permitted under *Ex parte Young*, 203 U.S. 123 (1908), and, as noted above, could not now seek such an injunction (even if permitted under the FLSA) since Maine has been paying the plaintiffs overtime for nearly three years. *See also Mills v. Maine*, 118 F.3d 37, 51-55 (1st Cir. 1997) (rejecting similar argument in federal lawsuit). Finally, Maine has not waived its immunity to this overtime suit. *See also* 26 M.R.S.A. § 664(3)(D) (state overtime law). That should be the end of the matter.

The plaintiffs' arguments to the contrary are wholly unconvincing. *First*, the plaintiffs argue that Maine courts must entertain FLSA damage suits against the State of Maine because Congress authorized such suits. *See* Appellant's Brief at 11-14. It bears repeating that in *Seminole Tribe*, the Court made explicit that there is nothing inconsistent between a finding that Congress had authority to enact legislation which applies to States and a finding that Congress did not have authority to subject unconsenting States to damages actions under such legislation: "Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe*, 116 S. Ct. at 1131 (footnote omitted).

As noted above, after the Court found that FLSA could constitutionally be applied to States, *see Maryland v. Wirtz*, 392 U.S. 183 (1968), the Court nevertheless found that States could not be sued for damages in the face of the eleventh amendment. *See Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279 (1973). It therefore does not violate the Supremacy Clause to conclude that Congress lacks the authority to subject States to FLSA damage actions even if Congress has the authority to apply the FLSA to States.

Certainly none of the Supremacy Clause cases cited by the plaintiffs address this issue—these cases simply stand

for the unremarkable proposition that if Congress has the constitutional power to act, States cannot overrule or ignore those actions in the face of the Supremacy Clause. For example, in *Howlett v. Rose*, 496 U.S. 356 (1990) (cited in Appellants' Brief at 11, 13, 14), the issue was "whether a state-law defense of 'sovereign immunity' is available to a school board otherwise subject to suit in a Florida court even though such a defense would not be available if the action had been brought in a federal forum." 496 U.S. at 359. The issue here is precisely the opposite—should the State have available a defense in state court that was available when the action was brought in the federal forum?

Second, the plaintiffs argue that Maine cannot discriminate against a federal cause of action, namely, an FLSA damages action. *See* Appellant's Brief at 14-21. This argument is based on the erroneous assertion that Maine law permits individuals to sue the State of Maine for overtime, *see id.* at 18-21, which, as demonstrated above, is demonstrably untrue. *See* 26 M.R.S.A. § 664(3)(D).

In considering the plaintiffs' argument, we begin with the recognition that Congress cannot simply commandeer Maine's state courts in order to enforce the FLSA against the State of Maine. *New York v. United States*, 505 U.S. 144, 161 (1992).

In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power to compel the States to require or prohibit those acts. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Con-

gress to regulate state governments' regulation of interstate commerce.

Id. at 166 (citations omitted (quoted in part in *Printz v. United States*, 117 S. Ct. at 2379)). Thus, when a law enacted for carrying into execution the Commerce Clause violates the principle of State sovereign immunity, it is "in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" *Printz v. United States*, 117 S. Ct. at 2379 (quoting The Federalist No. 33, at 204 (A. Hamilton) (C. Rossiter ed. 1961)) (brackets added by Court).

Under these circumstances, the plaintiffs' reliance on *Printz v. United States*, 117 S. Ct. 2365 (1997), is puzzling. See Appellant's Brief at 17-18. In that case, the Court held that certain interim provisions of the Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536, which applied to local law enforcement officers, violated State sovereign immunity and were thus unconstitutional. *Printz v. United States*, 117 S. Ct. at 2384. Because the case did not involve either a State or the authorization of a damages action in state or federal court, the Supreme Court had no occasion to address the principles of State sovereign immunity exemplified in the eleventh amendment. Indeed, none of the cases cited by the plaintiffs questioned the congressional power to abrogate State sovereign immunity in state or federal court.

In fact, the *Printz* Court distinguished the cases relied upon by the plaintiffs in this appeal. For example, the Court observed that "[t]he *Second Employers' Liability Cases* stand for the proposition that a state court must entertain a claim arising under federal law 'when its ordinary jurisdiction as prescribed by local law is appropriate to the occasion and is invoked in conformity with those laws.'" *Id.* at 2370 (quoting *Second Employers' Liability Cases*, 223 U.S. 1, 56-57 (1912) (emphasis added) (cited in Appellant's Brief at 14-15, 17-18)). Since over 20 years of decisions from this court demonstrate that Maine's ordinary jurisdiction precludes the

plaintiffs' claims, Maine is not discriminating against a federal cause of action.

Likewise, the *Printz* Court observed that "*Testa* stands for the proposition that state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause[.] " *Printz v. United States*, 117 S. Ct. at 2381 (citing *Testa v. Katt*, 330 U.S. 386 (1947) (cited in Appellant's Brief at 11, 16, 17, 18)). This conclusion, however, does not advance the plaintiffs' cause since federal law in the form of *Seminole Tribe* precludes their FLSA damages claim against States in either federal or state court. As the *Printz* Court explained:

The Supremacy Clause, however, makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]"; so the Supremacy Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereign immunity and are thus not in accord with the Constitution.

Printz v. United States, 117 S. Ct. at 2379 (brackets added by Court). Stated differently, Maine is not discriminating against a federal cause of action if the cause of action cannot be brought against the State of Maine in federal court, and if, under controlling decisions from the Law Court and from the United States Supreme Court, the cause of action also cannot be brought against the State of Maine in state court.

Third, the plaintiffs argue that the eleventh amendment, by its terms, does not apply to state courts. See Appellant's Brief at 21-22. As the numerous authorities quoted above, culminating in *Moody* in this court and in *Seminole Tribe* in the Supreme Court, establish beyond peradventure, while the eleventh amendment does not expressly refer to state courts, courts should not read the eleventh amendment literally—the principles of State sovereign immunity, as exemplified in the eleventh amendment, apply with equal force in state court. See, e.g.,

Moody, 661 A.2d at 158 n.3 ("Although the Eleventh Amendment is not directly applicable to state courts, the doctrine of sovereign immunity similarly protects the states from actions of state courts.") (citations omitted); *Seminole Tribe*, 116 S. Ct. at 1122 (the eleventh amendment "stand[s] not so much for what it says, but for the presupposition * * * which it confirms") (ellipsis added by Court and quotation omitted).

Fourth, the plaintiffs argue that *Seminole Tribe* only concerns Congress' power to abrogate State sovereign immunity in federal court. See Appellant's Brief at 22-23. This argument is based on a single sentence from *Seminole Tribe*, and the plaintiffs do not make any attempt to reconcile this argument with the dozens of pages of the Court's opinion excerpted above that discuss State sovereign immunity in both state and federal courts.

The plaintiffs attempt to bolster this crabbed reading of *Seminole Tribe* by relying on a handful of lower federal courts, which have suggested in passing that notwithstanding *Seminole Tribe*, individuals can still bring their FLSA suits in state court. See Appellant's Brief at 23 & n.10. As the court below suggested, this is, at best, gratuitous *dicta* from these lower federal courts, see App. A66-A67 (decision below), and it may simply be an attempt to soften the blow of dismissing the plaintiffs' federal FLSA claims by suggesting that some other court might be willing to entertain their claims.

Moreover, this gratuitous *dicta* certainly is not the product of any careful thought or research. In *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996), amended on petition for rehearing, 107 F.3d 358 (6th Cir. 1997), the court did not cite any authority for the proposition that individuals could still bring FLSA actions in state court following *Seminole Tribe*. See also *Rehberg v. Department of Public Safety*, 946 F. Supp. 741, 743 (S.D. Iowa 1996), *aff'd without opinion*, 117 F.3d 1423 (8th Cir. 1997) (relying exclusively on *Wilson-Jones* for the same proposition).

In the only other reported decision cited by the plaintiffs, *Aaron v. Kansas* 115 F.3d 813 (10th Cir. 1997), the court relied principally on a concurring opinion issued by two (now deceased) Justices. See *id.* at 817 (citing *Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279, 297-98 (1973) (Marshall, J., concurring in the result)). This view was not adopted by the Court in 1973, and this view certainly cannot be squared with the views of the *Seminole Tribe* Court in 1996 quoted above.

Indeed, none of the lower federal courts that have suggested individuals can still bring FLSA damage actions against States in state court have attempted to reconcile that view with the language of *Seminole Tribe* quoted above in which the Supreme Court listed the four remaining alternatives, for forcing States to comply with federal laws passed pursuant to the Commerce Clause, and pointedly excluded the possibility of filing damage actions in state court. See *Seminole Tribe*, 116 S. Ct. at 1131 n.14.

In sum, controlling decisions from the Law Court and from the United States Supreme Court converge on the same conclusion—Congress did not have authority when it enacted the Fair Labor Standards Act pursuant to the Commerce Clause to abrogate State sovereign immunity in order to permit damages actions in either federal or state court. Like the plaintiffs' federal lawsuit, the plaintiffs' state lawsuit was properly dismissed.

CONCLUSION

Based upon the foregoing, the defendant-appellee requests that this court affirm the judgment entered below.

Dated: November 21, 1997
Augusta, Maine

Respectfully submitted,

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[Certificate of Service Omitted]

IN THE MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

[Caption Omitted]

BRIEF FOR THE UNITED
STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The Fair Labor Standards Act ("FLSA") establishes federal wage and overtime standards. 29 U.S.C. § 201 *et seq.* These provisions apply to the states as employers. *See* 29 U.S.C. § 203(d); *Mills v. Maine*, 118 F.3d 37, 42 (1st Cir. 1997). Congress has created a private right of action under the statute and has provided that state employees may assert this cause of action in any "Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b):

The Superior Court below held that principles of state sovereign immunity barred it from considering a claim brought against the State of Maine under the FLSA. Because the court's ruling effectively invalidates an act of Congress, and because its ruling impairs a crucial enforcement mechanism for enforcing the statute, the United States respectfully files this brief as amicus curiae to urge reversal.

STATEMENT OF THE CASE

A. *Statutory Framework.*1. *The FLSA.*

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201 *et seq.*, establishes federal minimum wage and overtime standards and provides equitable and monetary remedies for violations of the Act. These provisions apply to "employers." See 29 U.S.C. 206, 207. An "[e]mployer" is defined to include a "public agency," *id.* § 203(d), which in turn is defined to include "the government of a State." *Id.* § 203(x). A covered "employee" includes, with certain exceptions not relevant here, "any individual employed by a State." *Id.* § 203(e)(2)(C).

The Act affords covered employees an express private right of action against their employers for back pay and liquidated damages, with concurrent jurisdiction in state and federal courts. It provides that an action to recover unpaid minimum wages or overtime compensation and an equal amount of liquidated damages "may be maintained against any employer (*including a public agency*) in any Federal or State court of competent jurisdiction by any one or more employees." 29 U.S.C. 216(b) (emphasis added).

The United States Secretary of Labor is responsible for the administration and enforcement of the minimum wage, overtime, and child labor provisions of the FLSA. See 29 U.S.C. §§ 204, 211, 216(c). The FLSA authorizes actions both by individual employees, like appellants in this case, and by the Secretary on their behalf. See 29 U.S.C. §§ 216(b)-(c), 217.

2. *Maine Wage Enforcement Statutes.*

Maine state law provides minimum wage and overtime wage standards. See 26 Me Rev. Stat. § 664. State employees are generally covered by the state minimum wage

laws. See 26 Me Rev. Stat. § 663(10). State employees may bring suit in state court to enforce the state minimum wage standards and recover unpaid wages, liquidated damages (double damages), costs and fees, from their employer, the State. See 26 Me Rev. Stat. § 670. As a matter of state substantive law, however, the State has exempted itself from the state law requirement of paying time and a half for hours worked in excess of 40 hours per week. See 26 Me Rev. Stat. § 664(3)(D).

B. *Course of Proceedings and Disposition Below.*

This is an action for unpaid overtime compensation brought by a group of state probation officers against the State of Maine under Section 16(b) of the FLSA, 29 U.S.C. 216(b). Plaintiffs originally filed their complaint in the United States District Court for the District of Maine on December 21, 1992, seeking back wages and an equal amount of liquidated damages for the three years preceding that date. The district court entered judgment for plaintiffs as to liability.¹ In accordance with the court's ruling, the State has paid overtime as required by the FLSA since February 1994.

As the case was nearing final judgment, the Supreme Court issued its decision in *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996). The Court in that case held that Congress lacks power under the Commerce Clause to enact statutes that abrogate the Eleventh Amendment immunity of the states from private actions in federal court. As a result, on July 3, 1996, the federal district court dismissed the action for lack of jurisdiction. A43-A44.² That dismissal was later affirmed in *Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997).

¹ The federal district court issued two reported decisions in the predecessor case, *Mills v. Maine*, 839 F. Supp. 3 (D. Me. 1993) (liability), and *Mills v. Maine*, 853 F. Supp. 551 (D. Me. 1994) (general damage issues).

² Citations to "A—" refer to the Appendix submitted to the Court with Appellants' brief.

After the district court's dismissal of their claims, plaintiffs filed the identical claims in Maine Superior Court. A1, A11-A13. The State moved for judgment on the pleadings urging that suit was barred by the statute of limitations and by state sovereign immunity. A45. The Secretary of Labor filed a brief as amicus curiae opposing the motion.

C. The Superior Court's Decision

The Superior Court dismissed the action on grounds of sovereign immunity. A57-A68. The court concluded that its decision was compelled by four prior decisions of this Court. See A61-A64 (discussing *Moody v. Commissioner, Dep't of Human Servs.*, 661 A.2d 156 (Me. 1995); *Jackson v. State*, 544 A.2d 291 (Me. 1988), cert. denied, 491 U.S. 904 (1989); *Thiboutot v. State*, 405 A.2d 230 (Me. 1979), aff'd on other grounds, 448 U.S. 1 (1980); and *Drake v. Smith*, 390 A.2d 541 (Me. 1978)). In the court's view, those cases establish the broad proposition that "in Maine the doctrine of state sovereign immunity has incorporated the principles of Eleventh Amendment immunity. Simply put, if a plaintiff can't seek damages against the state for violations of a federal law in federal court, the plaintiff can't seek damages in state court either." A64.

The Superior Court then considered whether the Maine cases are consistent with federal constitutional law. As it read *Seminole Tribe*, "[t]he Court speaks of the Eleventh Amendment as though it were synonymous with common law sovereign immunity." A64-A65. Therefore, in the court's view, "it is certainly rational for the Law Court to continue to apply Eleventh Amendment principles to state sovereign immunity." A65

The Superior Court acknowledged that the Supremacy Clause was not discussed in the four Law Court cases, and that several federal courts, in dismissing FLSA actions

in light of *Seminole Tribe*, had suggested in dicta that state courts would remain obligated by the Supremacy Clause to provide relief in private FLSA actions. A66. It nevertheless found the Supremacy Clause argument unpersuasive because the federal legislation (the FLSA) was not "authorized." A67. In the court's view:

Because Congress did not have the power under the Commerce Clause to abrogate Eleventh Amendment immunity and because state sovereign immunity is synonymous with Eleventh Amendment immunity, Congress did not have the power to abrogate the immunity of states to be sued for damages in their own courts, without their consent. Therefore, the Supremacy Clause does not come into play.

Ibid.

In a footnote, the court also rejected the Secretary's reliance on *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991), which held that the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*, created a private right of action against states enforceable in state court even though unenforceable in federal court under the Eleventh Amendment. A65-A66 n.6. The court described *Hilton* as "a difficult case to place in the framework of the Court's Eleventh Amendment jurisprudence." *Ibid.* The court speculated that the decision was based largely on stare decisis and questioned whether it remains good law after *Seminole Tribe*. *Ibid.*

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Supremacy Clause of the United States Constitution requires a state court to enforce a federal cause of action brought by a state employee for back wages, notwithstanding the state's assertion of sovereign immunity, especially where as here the state employee may bring a state law claim for back wages in state court.

SUMMARY OF ARGUMENT

The Supreme Court has held that Congress, in making state employers subject to federal wage and overtime standards, has acted under the authority of the Commerce Clause and consistent with the Tenth Amendment. As the Supreme Court has made clear, where Congress acts within the scope of its powers and creates a federal law cause of action against a state, the federal claim may proceed in state court even when the Eleventh Amendment bars federal court jurisdiction. Neither the Eleventh Amendment, nor state law sovereign immunity, overrides a state court's duty under the Supremacy Clause to enforce federal law, as the "supreme Law of the Land." Thus, here the Superior Court was required by the Supremacy Clause to hear plaintiffs' FLSA action and to enforce the FLSA against the state, notwithstanding its assertion of state law sovereign immunity.

Moreover, although the state casts its arguments in terms of immunity from suit, the question, at bottom, is whether federal or state law will define the state employee's cause of action against the state for back wages. Both the federal government and the State of Maine have enacted wage standards applicable to state employees. Both the federal government and the State of Maine provide for a private right of action for state employees to collect back wages. Accordingly, this is not a case about whether state employees may sue the State of Maine in state court for back wages—such actions are allowed under state law. Rather, the issue is whether the state court can choose to enforce the state law wage standards, while refusing to hear the employees' claims based upon the federal wage standards. That type of discrimination against federal law is clearly precluded by the Supremacy Clause. Where Congress acts within its powers, its law is the law of the land, and it preempts any inconsistent state law. State courts are required by the Supremacy Clause to

enforce federal law, even where the state asserts a state law immunity from suit. Plainly, a state court cannot choose to give effect to state causes of action while barring those based on controlling federal law.

ARGUMENT

THE SUPREMACY CLAUSE REQUIRES A STATE COURT TO ENFORCE FEDERAL LAW, AND PROHIBITS A STATE COURT REFUSING TO HEAR BACK WAGE CLAIMS AGAINST THE STATE UNDER FEDERAL LAW, WHILE HEARING BACK WAGE CLAIMS AGAINST THE STATE UNDER STATE LAW.

Congress has enacted federal minimum wage and overtime standards applicable to state, as well as private, employers. Congress has created a federal private right of action to enforce the employee rights it has created, and has provided that claims under the FLSA may be brought in state as well as federal court.

The Superior Court cited two bases for barring plaintiffs' claim, thereby effectively invalidating an act of Congress. The court concluded, first, that state sovereign immunity barred suit. Second, that court concluded that suit was barred by the Eleventh Amendment.

Both conclusions reflect a misunderstanding of principles of federalism and the Eleventh Amendment. Nor can they be reconciled with the rulings of the federal courts in the wake of *Seminole Tribe*. These decisions have uniformly recognized that the Eleventh Amendment bars suits under the FLSA only in federal court; the federal cause of action against the state may still be asserted against the state in state court. See, e.g., *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996), modified, 107 F.3d 358 (6th Cir. 1997) (such a dismissal "does not permit states to avoid their legal duty to comply with the

provisions of the FLSA * * *. [S]tate employees may sue in state court for money damages under the FLSA, and a state court would be obligated by the Supremacy Clause to enforce federal law"); *Aaron v. Kansas*, 115 F.3d 813, 817 (10th Cir. 1997) ("the employee can sue in state court for money damages under the FLSA as a state court of general jurisdiction is obligated by the Supremacy Clause to enforce federal law"); *Rehberg v. Department of Public Safety*, 946 F. Supp. 741, 743 (S.D. Iowa 1996) ("Plaintiffs may still sue in state court under FLSA, and a state court would be obligated by the Supremacy Clause to enforce federal law"), *aff'd*, 117 F.3d 1423 (8th Cir. 1997) (table). *See also Raper v. State*, No. CL 68918 (Iowa Dist. Ct. Oct. 23, 1997) (attached as an addendum to this brief) (holding that under the Supremacy Clause a suit under the FLSA may proceed against a state in state court).

A. A State Court Must Enforce Federal Law As The Supreme Law Of The Land Notwithstanding The Assertion Of State Law Immunity From Suit.

1. *The Eleventh Amendment Does Not Apply In State Court.*

The federal government is, of course, a government of limited powers. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Congress cannot impose requirements on the states except as consistent with its enumerated powers and the limits on federal authority reflected in the Tenth Amendment.

Consistent with its constitutional authority, Congress extended some requirements of the FLSA to state employers and those requirements have been upheld by the Supreme Court. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985) (sustaining application of the FLSA to states and declaring that "nothing in the overtime and minimum-wage requirements

of the FLSA * * * is destructive of state sovereignty or violative of any constitutional provision").³

The Eleventh Amendment, unlike the Tenth Amendment, reflects not a substantive limitation on federal power but a limitation on federal court jurisdiction. The Eleventh Amendment provides that:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend XI. As reflected by its plain language, the Eleventh Amendment has no application to state court actions and restricts only the "Judicial power of the United States." The same phrase is used in Article III of the Constitution to create the federal judiciary.

The Supreme Court has repeatedly held that the Eleventh Amendment does *not* apply to actions in state courts. *See Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 204-205 (1991) (citation omitted) ("as we have stated on many occasions, 'the Eleventh Amendment does not apply in state courts'"); *Will v. Michigan Dep't of State Police*, 491 U.S., 63-64 (1989) ("the Eleventh Amendment does not apply to state courts"); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980) ("no Eleventh Amendment question is presented, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only '[t]he Judicial power of the United States'"); *Nevada v. Hall*, 440 U.S. 410, 420-421 (1979).

³ Although the State initially raised a Tenth Amendment defense in this litigation, it later conceded that *Garcia* requires it to comply with the FLSA. *See* Defendant's Brief in Support of Its Motion for Judgment and in Opposition to Plaintiffs' Motion to Strike Affirmative Defenses at 6.

The Eleventh Amendment's limitation upon the federal judicial power "is, without question, a reflection of concern for the sovereignty of the States, but in a particular limited context." *Employees of Department of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri*, 411 U.S. 279, 293 (1973) (Marshall, J., concurring). "The issue is not the general immunity of the States from private suit * * * but merely the susceptibility of the States to suit before federal tribunals." *Id.* at 293-294. The Eleventh Amendment restricts the federal judicial power over the states because of "problems of federalism inherent in making one sovereign appear against its will in the courts of the other." *Ibid.* See also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-240 n.2 (1985) (endorsing Justice Marshall's concurrence in *Employees of Department of Public Health and Welfare of Missouri*).

The Superior Court below mistakenly relied on dicta in *Seminole Tribe* to conclude that the Supreme Court had extended the Eleventh Amendment bar to suit to claims brought in state court. The Court in *Seminole Tribe* repeatedly recognized that the Eleventh Amendment pertains to the federal judicial power and to federal jurisdiction.⁴ The Court also described the immunity in gen-

⁴ See *Seminole Tribe*, 116 S. Ct. at 1122 ("For over a century we have reaffirmed that federal jurisdiction over * * * unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States'" (emphasis added); *id.* at 1123 ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute") (emphasis added); *id.* at 1127 ("It was well established in 1989 when *Union Gas* was decided that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III. The text of the Amendment . . . is clear enough on this point: 'The judicial power of the United States shall not be construed to extend to any suit . . .'" (emphasis added); *id.* at 1128 ("it had seemed fundamental that Congress could not expand the jurisdiction of the fed-

eral terms of common law sovereign immunity. For example, the Court stated, "the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." 116 S. Ct. at 1131. Similarly, the court quoted the statement in *Hans v. Louisiana*, 134 U.S. 1, 13 (1890), that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent," *Seminole Tribe*, 116 S. Ct. at 1122.

Such characterizations of the Eleventh Amendment immunity do *not* represent a change in the Court's construction of the Amendment as not "appl[icable] in state courts." *Hilton*, 502 U.S. at 204-205. Similar statements have been made in reference to the amenability of states from suit in federal court for more than a century. See *In re Ayer*, 123 U.S. 443, 502 (1887); *Hans*, 134 U.S. at 15-16; *Ex Parte New York*, 256 U.S. 490, 497-498 (1921). These general statements of the state's immunity to suit without its consent have never been construed to grant a state immunity from adhering to federal law in its own courts.

To the contrary, the Supreme Court has made clear that a state court must enforce federal law against a state and its officers, notwithstanding the assertion of state law immunity. As we show below, where, as here, Congress has acted within its powers to create a federal cause of action, state courts may not bar their doors to a federal law claim, particularly where, as here, the state allows similar claims based on state law to go forward.

eral courts beyond the bounds of Article III") (emphasis added); *id.* at 1131-1132 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction") (emphasis added).

2. Where Congress Has Properly Subjected A State To Federal Law, The Supremacy Clause Mandates That State Courts Enforce The Federal Law.

The Supremacy Clause of the United States Constitution provides that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2. By its terms, the Supremacy Clause speaks directly to state judges, who "shall be bound" to recognize the supremacy of federal law, like the FLSA, and to resolve any conflicts between federal and state law in favor of federal law. *See, e.g., Howlett v. Rose*, 496 U.S. 356, 375 (1990).⁵ Thus, "State Courts must interpret and enforce faithfully the 'supreme Law of the Land' and their decisions are subject to review by

⁵ The duty of state judges to apply federal law is inherent in our constitutional system of government. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 340 (1816). *See also Testa v. Katt*, 330 U.S. 394, 389-390 (1947). The requirement that state judges apply the supreme law of the land does not raise any question of improperly "commandeering" state officials. Under *Printz v. United States*, 117 S. Ct. 2365 (1997), and *New York v. United States*, 505 U.S. 144 (1992), Congress may not commandeer state legislatures or executive branch officials to enact or administer a federal regulatory program. In both cases, however, the Court was careful to distinguish and reaffirm the duty of state court judges to enforce federal law under the Supremacy Clause. *See New York*, 505 U.S. at 178-179 ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause"); *Printz*, 117 S. Ct. at 2381 ("state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause").

[the Supreme] Court." *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 29 (1990). Even where a federal action against a state is barred from federal court by the Eleventh Amendment, the federal rights remain fully enforceable in state court, and the Supreme Court's appellate review ensures uniformity in the interpretation of federal law. *Id.* at 29-30 & n.13.

Indeed, the Superior Court's ruling here is directly contrary to the Supreme Court's ruling in *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991). In *Hilton*, the employee sued a state railroad in federal court under the Federal Employers' Liability Act ("FELA"). After the Supreme Court held that the Jones Act (which incorporates the FELA) does not abrogate the state's Eleventh Amendment immunity, the employee dismissed the federal court FELA action and refiled it in state court. The state court dismissed his action on the ground that FELA did not authorize damage actions against the states. The Supreme Court reversed and held that the FELA action could be maintained against the state *in state court*. Most of the Court's decision addressed the question of whether Congress intended the Act to be enforced against the State. Concluding that it did, the Court expressly held that the Eleventh Amendment does not bar a federal cause of action in state court where Congress explicitly intends to subject a state to suit. The Court explained that when Congress has clearly manifested its intent to subject the state to a money damage action, "the Supremacy Clause makes the statute the law in every state, *fully enforceable in state court.*" *Id.* at 207 (emphasis added).

The error of the Superior Court's ruling is underscored by the Supreme Court's analysis in *Atascadero State Hosp. v. Scanlon*, *supra*, and *Howlett v. Rose*, *supra*. In *Atascadero*, the Court held a federal Rehabilitation Act handicap discrimination claim could not be brought in federal court against a state because Congress had not abrogated

state Eleventh Amendment immunity from suit in federal court. *Atascadero*, 473 U.S. at 240-247. In dissent, Justice Brennan argued that the Court's holding would exempt states from compliance with the Rehabilitation Act. The majority squarely addressed Justice Brennan's concern and rejected it as "wholly misconceiv[ing] our federal system." *Id.* at 239-240 n.2. The Court explained *state courts* would still enforce the Act against the State, and that the Eleventh Amendment was *not* a grant of "general immunity from private suit * * *, but merely the susceptibility of the States to suit before *federal tribunals*." *Id.* at 240 n.2 (quotation marks and citation omitted) (emphasis in original). The Court added that "[i]t denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land." *Ibid.* See also *Chandler v. Dix*, 194 U.S. 590, 592 (1904) (dismissing an action from federal court based upon Eleventh Amendment immunity, but holding that the plaintiff's "rights secured by the Constitution and laws of the United States * * * could bring the case here [to the Supreme Court] by writ of error from the highest courts of the State").

In *Howlett v. Rose*, *supra*, the Supreme Court explained that a state court cannot refuse to hear a federal cause of action for money damages based upon state law sovereign immunity. The Court held that even if a school board possessed sovereign immunity from money damage actions under state law, the state court was required, by the Supremacy Clause, to hear the federal claim and enforce the federal law against the board. The Court explained, "as to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common-law heritage" to define the scope of sovereign immunity or "to redefine the federal cause of action." *Howlett*, 496 U.S. at 383.⁶

⁶ In *Raper v. State*, No. CL 68918 (Iowa Dist. Ct. Oct. 23, 1997), the Iowa court held that the Supremacy Clause required the state

See also *Felder v. Casey*, 487 U.S. 131, 153 (1988) (where a state law is "designed to minimize government liability," "principles of federalism, as well as Supremacy Clause, dictate that such a state law give way to vindication of the federal right when that right is asserted in state court").

The Superior Court's ruling here cannot be reconciled with *Hilton*, *Atascadero*, and *Howlett*. Here, there can be no doubt that Congress intended to subject state employers to FLSA money damage actions in state court. See 29 U.S.C. § 203, 216(b); *Mills v. Maine*, 118 F.3d at 41-42. Thus, under *Hilton*, *Atascadero*, and *Howlett*, the Supremacy Clause makes the FLSA the prevailing law in Maine and the FLSA remains "fully enforceable in state court." *Hilton*, 502 U.S. at 207.⁷

court to hear the FLSA claim against the state employer. The *Raper* Court applied *Howlett v. Rose*, *supra*, and held that the state's claim of sovereign immunity would violate two corollaries of the Supremacy Clause: (1) a state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a "valid excuse" (496 U.S. at 369), and (2) an excuse that is inconsistent with or violate federal law is not a valid excuse (*id.* at 371). *Raper*, slip op. at 12. The Court explained that under *Howlett* the assertion of state common law sovereign immunity is not a "valid excuse" for a state court to refrain from applying federal law. *Id.* at 13.

⁷ The Superior Court discounted *Hilton* in a footnote in part because it thought the decision was based largely on *stare decisis*. A65-A66 n.6. *Stare decisis* was relevant in *Hilton* only to the threshold question of whether FELA was intended to apply to state employers. Once that question was resolved, the Court squarely said that state courts must provide a remedy for violations of the federal statute, including violations by state employers. That ruling is dispositive here.

B. Under The Supremacy Clause, A State May Not Choose To Enforce Its Own Law And Bar Similar Actions Based Upon Controlling Federal Law.

In the present case, even more clearly than in any of the cases discussed above, the fundamental principles of our federal system preclude the State Court from closing its door to a claim based on federal law. Like the FLSA, Maine law provides minimum wage and overtime wage standards. See 26 Me. Rev. Stat. § 664. Maine state law permits a state employee to bring a claim in state court for back wages based on violation of state law wage standards.⁸ At bottom, the present case is simply a dispute as to which substantive law may be asserted in such a suit. There can be no dispute that the Maine Superior Court would enforce Maine wage laws against the State. Yet, here it refuses to enforce federal wage and overtime standards. Such discrimination against federal law is plainly impermissible. Although Maine couches its argument in immunity terms, its fundamental position is simply that Maine law—not federal law—controls in a state employee's suit for back wages.

This is precisely the type of discrimination against federal law that the Constitution will not countenance. “[A] state court of competent jurisdiction” is required to “treat

⁸ State employees are generally covered by the State minimum wage laws. See 26 Me. Rev. Stat. § 663(10). State employees may bring suit in State court to enforce the State minimum wage standards and to recover unpaid wages, liquidated damages (double damages), costs and fees, from their employer, the State. See 26 Me. Rev. Stat. § 670. As a matter of state substantive law, however, the State has exempted itself from the State law requirement of paying time and a half for hours worked in excess of 40 hours per week. See 26 Me. Rev. Stat. § 664(3)(D). The State is, however, subject to suit for in state court for back wages due under state law (including recovery for hours of overtime (i.e., in excess of 40 hours per week) that were not compensated properly under State minimum wage standards) to a state employee. See 26 Me. Rev. Stat. §§ 663(10), 670.

federal law as the law of the land.” *Howlett*, 496 U.S. at 372. The “Federal Constitution prohibits state courts of general jurisdiction from refusing to [enforce a federal statute] * * * solely because the suit is brought under a federal law.” *Id.* at 373. In *Testa v. Katt*, 330 U.S. 394 (1947), the Court reversed a state court’s refusal to enforce the double damage provisions of the Emergency Price Control Act based upon contrary state policies. The Supreme Court held that because Rhode Island had courts of competent jurisdiction, which heard the “same type” of claims arising under state law, the state court could not refuse to hear the federal claims and enforce the Act’s double damage provision. *Id.* at 393-394. At bottom, a state court cannot deny jurisdiction on the basis that the plaintiff “is suing to enforce a federal act.” *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233-234 (1934). “A state may not discriminate against rights arising under federal laws.” *Ibid.* As the Supreme Court explained in *Testa v. Katt*, *supra*, a state may not treat federal law as emanating from a foreign sovereign. *Testa*, 330 U.S. at 389-390.

The assertion of immunity under state law does not alter the duty of a state court here to enforce federal law. As explained above, when Congress has validly defined a substantive right, a state may not discriminate against that claim or defeat that right by invoking principles of sovereign immunity. In *Howlett v. Rose*, *supra*, the Court held that a State could not refuse to hear the federal cause of action by relying upon state law sovereign immunity or by claiming a lack of jurisdiction due to the sovereign immunity. *Howlett*, 496 U.S. at 378-383. As long as the state has constituted a court of general jurisdiction, it must hear claims based upon valid federal law, even if the court does not typically exercise jurisdiction over claims for money damages against the defendant based upon state law sovereign immunity. *Id.* at 378-80. “The fact that a rule is denominated jurisdictional does

not provide a court an excuse to avoid the obligation to enforce federal law." *Id.* at 381.

In *Martinez v. California*, 444 U.S. 277, 283-284 (1980), the Court similarly rejected California's argument that its state law immunity statute barred the federal claim under Section 1983 against the state parole officer in state court. The Court explained that to afford the state immunity "controlling effect" over the federal law would violate the Supremacy Clause. *Id.* at 284 n.8. To permit state law immunity to defeat a federal act "would [improperly] transmute a basic guarantee into an illusory promise." *Ibid.*

In the FLSA, Congress, acting within the scope of its powers, has made state employers, as well as private employers, subject to minimum wage and overtime standards and has afforded the employee an action in state court for money damages. The Supremacy Clause means that the state court must treat federal law as the "Law of the Land." *Howlett*, 496 U.S. at 369. To the extent there is a substantive difference between the substantive standard for compensation of state employees under the FLSA and state law, the federal law would preempt any inconsistent state law. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Robards v. Cotton Mill Assoc.*, 677 A.2d 540, 543 (Me. 1996). Cf. 29 U.S.C. § 218 (preserving more protective state laws). The state court must respect the federal law as authoritative, "as much as laws passed by the state legislature," *Howlett*, 496 U.S. at 380, and may not discriminate against the substantive law enacted by Congress. Indeed, "state law that conflicts with federal law is without effect." *Cipollone*, 505 U.S. at 516 (citation and internal quotation omitted).

Thus, the Superior Court's ruling here "misconceives our federal system." *Atascadero State Hosp.*, 473 U.S. at 239-240 n.2. The assertion of sovereign immunity by the State does not alter the state court's Supremacy Clause

obligations to enforce the supreme law of the land—the Constitution and federal laws duly enacted by Congress. Especially here, where a cause of action would be permitted under state law against the State for back wages, the Supremacy Clause dictates that the same action be heard in state court to enforce the applicable, and controlling, federal wage and overtime standards.⁹

Although the Superior Court cited several decisions of this Court discussing sovereign immunity (A61-A64 (discussing *Moody v. Commissioner, Dep't of Human Servs.*, 661 A.2d 156 (Me. 1995); *Jackson v. State*, 544 A.2d 291 (Me. 1988), *cert. denied*, 491 U.S. 904 (1989); *Thiboutot v. State*, 405 A.2d 230 (Me. 1979), *aff'd on other grounds*, 448 U.S. 1 (1980); and *Drake v. Smith*, 390 A.2d 541 (Me. 1978)), this Court has never subscribed to the Superior Court's view of state law sovereign immunity overriding the Supremacy Clause. None of the cases cited by the Superior Court involved the situation presented here where Congress has expressly provided a cause of action against the State and for enforcement of the federal right in state court. Rather, the cases cited by the Superior Court focused on whether, even in the absence of such congressional intent, the state would still be subject to suit in state court. As discussed by appel-

⁹ Moreover, given that Congress has lawfully provided state employees with a federal right to the payment of certain wages and to specified damages when the proper wages are not paid, it would raise a serious due process question if the state courts were to deny the employees their property interest in the federal remedy. See *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990); *Reich v. Collins*, 513 U.S. 106 (1994). In both *McKesson* and *Reich*, the Court held that the Due Process Clause requires state courts to provide a remedy for state taxes collected in violation of the laws or the constitution of the United States. In *Reich*, the Court emphasized state courts must provide relief to the taxpayers, "the sovereign immunity States traditionally enjoy in their own courts notwithstanding," even though the Eleventh Amendment bars tax refund suits against states in federal court. *Reich*, 513 U.S. at 109-110.

lants (*see* Appellants' Br. 25-29), this Court's decisions did not address the implications under the Supremacy Clause of upholding a state sovereign immunity defense that flatly contradicts the plain language of a federal statute subjecting a state to suit in state court. See *Moody*, 661 A.2d at 159 (Lipez, J., concurring). Nor do this Court's decisions authorize a state court to hear an action against the State based on state law, while refusing to hear the very same type of action based on federal law. Such discrimination against federal law is plainly barred by the Supremacy Clause.

CONCLUSION

The decision of the Superior Court should be reversed and the case remanded for proceedings on the merits of appellants' FLSA claims.

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SUPREME JUDICIAL COURT LAW COURT

[Caption Omitted]

APPELLEE'S BRIEF

INTRODUCTION

The United States has submitted a brief as *amicus curiae* urging this court to reverse the judgment entered below in which the Superior Court held that the sovereign immunity barred the plaintiffs' claims against the defendant-appellee, State of Maine ("Maine"). Maine submits this brief in response.

ARGUMENT

Before returning to the merits, several preliminary observations are appropriate. First, the views of the United States concerning this particular litigation are not the product of any investigation or familiarity with the facts of this matter. The United States Secretary of Labor ("Secretary") has statutory authority under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201, *et seq.*, to investigate States for alleged FLSA violations, *see* 29 U.S.C. §§ 209, 211, and the Secretary has statutory authority to sue States for alleged FLSA violations and to recover overtime wages for employees. *See* 29 U.S.C. §§ 216(c), 217. Nevertheless, the Secretary has never investigated the allegations in this case and certainly has not sued Maine for alleged FLSA violations.

Second, the views of the United States concerning the scope of the eleventh amendment and State sovereign immunity are not the product of any expertise. States cannot interpose a sovereign immunity defense against the United States. *See, e.g., West Virginia v. United States,*

479 U.S. 305, 311 (1987). Thus, the United States has had no occasion to litigate the scope of the eleventh amendment, and virtually none of the cases cited by the United States even involved the federal government. Accordingly, the views of the United States are not the product of any particular experience or expertise.

Third, the United States contends that the Superior Court's ruling "effectively invalidates an act of Congress[.]" Amicus Curiae Brief at 1. This fundamental misconception undermines the entire brief submitted by the United States. The Superior Court did not hold that the FLSA did not apply to Maine, or that the United States Secretary of Labor could not investigate or sue Maine for alleged FLSA violations—on the contrary, the Superior Court held only that individuals could not bring private FLSA actions against Maine.

Finally, all of the arguments raised by the United States were raised by the plaintiffs in the Appellants' Brief, and thus were addressed in detail in the Appellee's Brief. We briefly address the salient arguments advanced by the United States.

The United States argues that the Supremacy Clause bars Maine from asserting its sovereign immunity from FLSA damage claims asserted in Maine courts by Maine citizens. See Amicus Curiae Brief at 10-19. This argument founders immediately—the United States opens its argument with the acknowledgement that:

The federal government is, of course, a government of limited powers. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Congress cannot impose requirements on the states except as consistent with its enumerated powers and the limits on federal authority reflected in the Tenth Amendment.

Amicus Curiae Brief at 10. The question, then, as the court below expressly noted, is whether Congress had

authority to abrogate State sovereign immunity for private damages actions when it enacted the FLSA pursuant to the Commerce Clause. Appendix ("App.") A67 (decision below). As the court below properly ruled, following *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), the answer is plainly "no."

The United States, however, does not ask the question whether Congress had authority to abrogate State sovereign immunity for private actions when it enacted the FLSA pursuant to the Commerce Clause. Instead, it asks the question whether Congress had authority to extend the provisions of the FLSA to States, which it answers "yes" based on *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (5-4 decision rejecting tenth amendment challenge to FLSA). See Amicus Curiae Brief at 10-11.

As *Seminole Tribe* made plain, however, these are two separate questions. Even when Congress has authority to enact legislation that applies to States, it does not necessarily have authority to abrogate State sovereign immunity from private actions:

In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.

Seminole Tribe, 116 S. Ct. at 1131 (footnote omitted). Thus, although Congress had authority under the Commerce Clause to enact the Indian Gambling Regulatory

Act of 1988 ("IGRA"), 25 U.S.C. § 2701, *et seq.*, and to apply IGRA to the States, it did not have authority to authorize suits by private parties against unconsenting States. *Cf. Seminole Tribe*, 116 S. Ct. at 1126 n.10 (refusing to consider argument IGRA violated the tenth amendment). Likewise, even if Congress had authority under the Commerce Clause to apply the FLSA to States following *Garcia*, it did not have authority to authorize suits by private parties against unconsenting States following *Seminole Tribe*.

The United States does not make any serious effort to demonstrate that Congress, in fact, has authority under the Commerce Clause to authorize private FLSA actions against unconsenting States. On the contrary, the United States assiduously ignores *Seminole Tribe*, simply dismissing as "*dicta*" the Court's lengthy discussion of common law sovereign immunity. *See* Amicus Curiae Brief at 6, 13-14. We need not repeat the lengthy exegesis contained in *Seminole Tribe* which establishes beyond doubt that neither the express provisions of the Commerce Clause nor the Plan of the Convention authorizes Congress to abrogate State sovereign immunity from private actions when it enacts legislation, such as the FLSA, pursuant to the Commerce Clause. *See* Appellee's Brief at 23-30.

Indeed, like the plaintiffs, the United States does not even acknowledge the most pertinent passage in *Seminole Tribe* in which the Court necessarily rejected the central argument of the United States that, in order to coerce State compliance with federal law, abrogation of State sovereign immunity is necessary whenever Congress has authority to pass legislation that applies to States:

This argument wholly disregards other methods on ensuring compliance with federal law: the Federal Government can bring suit in federal court against a State; an individual can bring suit against a state official in order to ensure that the official's conduct

is in compliance with federal law; and this Court is empowered to review a question of federal law arising from a state court decision where a State has consented to suit.

Seminole Tribe, 116 S. Ct. at 1131 n.14 (citations omitted). Significantly, the Court did *not state* that Congress had authority under the Commerce Clause to abrogate a State's sovereign immunity from suit in its own courts.

Thus, assuming that Congress has authority to apply the FLSA to States, the United States Secretary of Labor could have sued Maine for alleged FLSA violations seeking damages (but chose not to) because Maine cannot assert a sovereign immunity defense against the United States. *See* 29 U.S.C. § 216(c). Likewise, if Maine was allegedly continuing to violate the FLSA (which the United States concedes it is not, *see* Amicus Curiae Brief at 4), the Secretary could have sued Maine seeking an injunction. *See* 29 U.S.C. § 217. Finally, if Maine had consented to suit for FLSA violations (which the United States concedes it has not, *see* Amicus Curiae Brief at 3), the Supreme Court could review any question of federal law on a petition for a writ of certiorari. *Cf. Chandler v. Dix*, 194 U.S. 590, 591-92 (1904) (cited in Amicus Curiae Brief at 18) (noting Supreme Court could hear appeal from state court after noting the State had waived its sovereign immunity in state court).

The United States attempts to sidestep the holding of *Seminole Tribe* by piecing together snippets, *i.e.*, *dicta*, from a handful of earlier cases. These isolated passages relied upon by the United States certainly cannot trump the repeated conclusion of the *Seminole Tribe* Court that Congress does not have authority to abrogate State sovereign immunity against private actions when it enacts legislation pursuant to the Commerce Clause.

For example, the primary case relied upon by the United States is *Hilton v. South Carolina Public Railways*

Commission, 502 U.S. 197 (1991). See Amicus Curiae Brief at 6, 12, 16-17. In *Hilton*, the issue was not Congress' power to abrogate State sovereign immunity, but rather whether Congress intended to create a cause of action under the Federal Employees' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 against a state-owned railroad, which, in turn, could be enforced in state court. 502 U.S. at 199. The Court had previously assumed that Congress *did* have the power under the Commerce Clause to abrogate state sovereign immunity in FELA actions. See *Welch v. Texas Department of Highways*, 483 U.S. 468, 475, 478 n.8 (1987) (plurality opinion). Following *Seminole Tribe*, this assumption is no longer true. See also *Ortega v. Portland*, 147 Or. App. 489, 936 P.2d 1037, 1039 n.4 (1997) noting that *Hilton* did not resolve the issue of Congress' power to abrogate state sovereign immunity under the Jones Act) (applying eleventh amendment principles to hold the State was immune from suit in state court); App. A66-A67 (decision below) (distinguishing *Hilton* on several ground and questioning whether *Hilton* remains good law after *Seminole Tribe*).

In *McKesson Corp. v. Division of Alcohol Beverages & Tobacco*, 496 U.S. 18 (1990) (cited in Amicus Curiae Brief at 15-16), the issue was whether the eleventh amendment prohibited the Supreme Court from reviewing a question of federal law on a writ of certiorari from state court. As *Seminole Tribe* made clear, the Supreme Court can review on certiorari questions of federal law if—and only if—the State consents to suit in state court, even if Congress lacks the authority to abrogate State sovereign immunity from private actions against unconsenting States. See *Seminole Tribe*, 116 S. Ct. at 1131 n.14.

The United States also relies heavily on *dicta* in a single footnote in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-40 n.2 (1985) (cited in Amicus Curiae Brief at 12-13, 16-18, 22-23), which in turn, quotes a passing

observation contained in an opinion concurring in the judgment issued by two (now deceased) Justices. See *Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279, 297-98 (1973) (Marshall, J., concurring in the result)). The United States does not—and cannot—make any attempt to reconcile this isolated 20-year-old comment with the directly contrary views of the majority in *Seminole Tribe* in 1996 quoted above. See *Seminole Tribe*, 116 S. Ct. at 1131 n.14.

Finally, the United States relies upon *Howlett v. Rose*, 496 U.S. 356 (1990). See Amicus Curiae Brief at 15, 18-19, 22. As explained previously, this case is easily distinguished and merely stands for the proposition that if Congress has the constitutional power to act, States cannot overrule or ignore those actions in the face of the Supremacy Clause. See Appellee's Brief at 31. None of the cases cited by the United States answer the question whether Congress has constitutional power to act to abrogate State sovereign immunity under the FLSA.*

* The lower court decisions cited by the United States are inapposite and certainly cannot overrule *Seminole Tribe*. First, as explained previously, the drive-by comments in a handful of recent federal court decisions quoted by the United States, see Amicus Curiae Brief at 9, are gratuitous *dicta*, are probably not the product of any briefing, and certainly are not the product of any discussion (much less, extensive analysis) of *Seminole Tribe*. See Appellee's Brief at 35-36. Second, the only state court decision that has held, following *Seminole Tribe*, individuals can sue unconsenting States in state court is readily distinguished. See Amicus Curiae Brief at 10, 18-19 (citing *Raper v. Iowa*, No. CL 68918 (Iowa Dist. Ct., Oct. 23, 1997)). The *Raper* court concluded that because Iowa lacked any constitutional provision concerning sovereign immunity, and because "Iowa Supreme Court precedent is substantially more limited than that of the Maine court, this Court concludes after extensive research and contemplation that the state sovereign immunity doctrine in Iowa is not applicable to this case." *Raper*, slip op. at 7. As the *Raper* court recognized, the law is quite different in Maine.

Notwithstanding the herculean efforts of the United States to elevate isolated comments from a handful of earlier Supreme Court cases into "rulings," "analysis," and the like, *see, e.g.*, Amicus Curiae Brief at 7, 9, 14-16, only *Seminole Tribe* answers the precise question presented by this case—did Congress have authority to abrogate State sovereign immunity when it passed the FLSA pursuant to the Commerce Clause? The inescapable conclusion of *Seminole Tribe* is that even when Congress has "complete lawmaking authority" to pass legislation under the Commerce Clause, "the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe*, 116 S. Ct. at 1131 (footnote omitted); *see generally id.* at 1125-31 (discussing issue as relating to "state sovereign immunity" generally, not simply immunity from suit in federal court).

The final argument of the United States is that Maine is somehow discriminating against a federal cause of action, which is likewise prohibited by the Supremacy Clause, because the Maine Legislature has passed some state wage laws, including a state overtime provision. *See* Amicus Curiae Brief at 20-25. This argument was also raised by the plaintiffs for the first time on appeal to this court, and fails for the same reasons the plaintiffs' argument falls short. *See* Appellee's Brief at 7-9.

First, this argument was not raised below, and thus cannot be raised for the first time on appeal. Second, Maine is not discriminating against overtime claims since it has not waived its sovereign immunity for such claims under either federal or state law. *See* 26 M.R.S.A. § 664 (3)(D).

On the merits, the discrimination argument advanced by the United States is even more bizarre than the similar argument advanced by the plaintiffs. Unlike the plaintiffs, the United States acknowledges that the Maine Legislature has expressly exempted the State of Maine from the

state overtime provisions. *See* Amicus Curiae Brief at 20 n.8 (citing M.R.S.A. § 664(3)(D)). The United States argues, however, that since the FLSA did not exempt States from the federal overtime provisions, "the federal law would preempt any inconsistent state law." Amicus Curiae Brief at 23 (citations omitted). It is difficult to fathom how a state statute that expressly exempts the State of Maine from private actions under the state overtime law thereby somehow constitutes consent to private actions under the federal overtime law, and simultaneously, is also invalid discrimination because it refuses to consent to private actions under either state or federal law. This nonsensical, new argument should be rejected out-of-hand,

In sum, for over 20 years, this court has held that when private parties cannot sue the State of Maine in federal court, they likewise cannot sue the State of Maine in state court. Following *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), since Congress does not have the authority to abrogate State sovereign immunity when it enacts legislation, such as the FLSA, pursuant to the Commerce Clause, there is no reason to disturb that conclusion.

CONCLUSION

Based upon the foregoing, the defendant-appellee, State of Maine, requests that this court affirm the judgment entered below.

Dated: December 8, 1997
Augusta, Maine

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[Certificate of Service Omitted]

MAINE SUPREME JUDICIAL COURT

 [Caption Omitted]

APPELLANTS' REPLY BRIEF

_____ Introduction

It is our position in this case that by reason of the Supremacy Clause of the Constitution of the United States, employees of the State of Maine can bring justiciable Fair Labor Standards Act claims against the State in the state courts of general jurisdiction and that those claims are not rendered non-justiciable by any state sovereign immunity doctrine.

In response, the State first suggests that our position rests on the proposition that the State has waived its sovereign immunity to FLSA claims and/or consented to FLSA suits, and that we failed to raise any "waiver" or "consent" point in the trial court. As we show in Part I below, this misapprehends our basic Supremacy Clause point.

And, contrary to the State suggestion that our Supremacy Clause point rests on the requirement that FLSA claims be *identical* to the state causes of action against the State that Maine courts of general jurisdiction do entertain, we show in Part II that the governing requirement is that the state causes of action and the federal causes of action be *analogous* and that this requirement is most certainly satisfied here.

Finally, the State contends that it has a *federal* constitutionally derived immunity against federal causes of action brought in the Maine courts. But as we show in Part III

below, while the State contends that the immunity derives from the Eleventh Amendment to the U.S. Constitution, the constitutional text, the relevant precedent, and logic belie that contention.

I. THE STATE ERRS IN ASSERTING THAT THE PLAINTIFFS ARE ADVANCING A NEW "WAIVER OF IMMUNITY" OR "CONSENT TO SUIT" ARGUMENT ON APPEAL

The State argues that we are advancing—and doing so for the first time on appeal—the argument that the State of Maine has waived its sovereign immunity to FLSA claims in state court and/or that the State has consented to FLSA suits, and that this Court does not entertain such new arguments. This argument wholly misconstrues our position. Stated as succinctly as we can, what we do contend is this:

First, nothing in the Maine Constitution or in the Maine common law limits the legislature's power to subject the State to private actions in the Maine courts seeking monetary remedies. And the legislature has in fact exercised its authority to enact a host of state laws which authorize state employees to bring suit against the State for damages, including wages owed. In its brief, the State does not dispute either of these essential propositions.

Second, under the Supremacy Clause of the United States Constitution, "[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State." *Howlett v. Rose*, 496 U.S. 356, 367 (1990), quoting *Claflin v. Houseman*, 93 U.S. 130, 136-137 (1876). For that reason, federal laws, such as the Fair Labor Standards Act, passed by Congress acting within the scope of its Article I authority, are as much a part of the law of Maine as laws

passed by the State legislature. (Here, there is no dispute regarding Congress' authority to enact the FLSA, and to apply it fully to the States, that precise authority having been held in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).)

Third, just as the laws passed by the Maine legislature suffice to subject the State to private damage actions brought by state employees, so too do laws passed by Congress. To hold otherwise, as the State urges here, would be to violate the fundamental principle, derived from the Supremacy Clause, "that a state may not exercise its judicial power in a manner that discriminates between analogous federal and state causes of action." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 776 n.1 (1982) (O'Connor, J., concurring and dissenting).

In consequence the U.S. Constitution requires the States to entertain in their courts claims that are premised on valid federal laws (such as the FLSA), when they entertain claims premised on state causes of action of the same general type. *Testa v. Katt*, 330 U.S. 386 (1947); *Howlett v. Rose*, 496 U.S. 356, 367 (1990). Because the Maine legislature has authorized private actions by state employees against the State that are of the same general type as Congress has authorized in the FLSA, the decision below fails to honor the court's federal constitutional obligation to entertain those federal claims.

Plainly, that is a Supremacy Clause argument, not a "waiver" or a "consent to suit" argument. To be sure, as our summary shows, the first postulate of our Supremacy Clause argument was, and is, that any immunity the State of Maine might invoke in its own courts is purely a creature of *state common law*, without federal constitutional stature and without the power to trump a valid federal law supported by the Supremacy Clause.¹ And, of

¹ Thus we asserted below that the courts of Maine do not derive from the Eleventh Amendment any categorical constitutional

course, the source and nature of the State's sovereign immunity was a subject of contention in the trial court and is here. Our opening brief in this appeal therefore begins and ends by describing in detail the true nature, and limited scope, of Maine's sovereign immunity law. See Appellant's Brief at 5-9, 24-30. By so doing, we sought to underscore that the State can claim no federal or state constitutional sovereign immunity in the Maine courts, and that the trial court's contrary ruling presents a clear case of discrimination against federal claims in violation of the Supremacy Clause. Thus our brief in this Court elaborates on the basic argument made below, but in no way alters our essential point or our bedrock reliance on the Supremacy Clause. Certainly it does not constitute the making of a new constitutional claim on appeal.²

immunity from federal obligations that Congress has explicitly imposed upon the State, and that any attempt to do so judicially would fail as a matter of federal constitutional law. See App. A32-34.

² The cases cited by the State do not support its contrary contention. Two of these cases stand for the proposition that an appellate court will not entertain an *entirely new constitutional claim* for the first time on appeal. See *Poire v. Manchester*, 506 A.2d 1160, 1164 (Me. 1986); *Cyr v. Cyr*, 432 A.2d 793, 797 (Me. 1981). Another pair of cases cited by the State stand for the proposition that a plaintiff may not raise on appeal *entirely new theories of the case*. See *Teel v. Corson*, 396 A.2d 708, 714 (Me. 1978); *Berner v. Delahanty*, 1997 U.S. App. LEXIS 30236 *12 n.8 (1st Cir. Oct. 28, 1997). For either of these two lines of cases to be controlling here, we would need to manufacture a hypothetical situation where the plaintiffs were now raising their *entire claim* based on the Supremacy Clause for the first time, thereby creating an *entirely new theory of the case* on appeal. This is obviously not the case here, where plaintiffs have always asserted a Supremacy Clause claim. Lastly, the State cites two cases which are applicable only to limited bodies of law irrelevant to the case at hand. *Morris*, for example, is a case particular to federal receivership law, holding that 12 U.S.C. § 1821 does not allow the Resolution Trust Company to raise new defenses on appeal. *Morris v. Resolution Trust Co.*, 622

II. THE SUPREMACY CLAUSE PROHIBITS DISCRIMINATION BY STATE COURTS AGAINST FEDERAL CAUSES OF ACTION THAT ARE ANALOGOUS TO JUSTICIABLE STATE CAUSES

In our opening brief, we demonstrated that under settled Supremacy Clause principles, recently reaffirmed by the Supreme Court, Maine can not close its courts' doors to federal law causes of action against the State—such as the FLSA cause of action here—where its courts entertain analogous state law claims against the State. Appellants Br. at 14-21; *see also*, U.S. Br. at 20-25. In response, the State contends that because “this argument is based on the erroneous assertion that Maine law permits individuals to sue the State of Maine for overtime,” and because Maine law does not so provide, there is no discrimination between the trial court's treatment of state and federal claims. Appellee's Br. at 31-32. This response rests on a profound misreading of our argument and of Supreme Court precedent construing the Supremacy Clause to prohibit states from disfavoring federal claims brought in their courts.

Our opening brief does *not* rest on any false assertion that Maine has authorized under its own laws the precise claims for overtime pay claimed here under the FLSA. Appellants' Br. at 19 & n.7; U.S. Br. at 3. Rather our brief demonstrates that in Maine, the Maine legislature has authorized numerous causes of action that state employees may bring against the State for back wages lost through illegal action and for wages owed and that such legislative action is not negated by any sovereign immunity doctrine. Appellants' Br. at 6-9. Given that demonstration, we relied on the clear Supreme Court precedent holding that state courts of general jurisdiction—and the

A.2d 708, 714 (Me. 1993). And *Townsend* is likewise a case particular to the special law of jury instruction. *Townsend v. Chute Chemical Co.*, 691 A.2d 199, 203 (Me. 1997).

Maine Superior Courts are indisputably courts of general jurisdiction—cannot be closed to federal claims which are of the “same type” as claims arising under state law that would be heard in those courts. *Testa v. Katt*, 330 U.S. 386, 394 (1947).³

As the facts of *Testa* make clear, the prohibited discriminatory treatment does not require an identity of federal and state claims. In *Testa*, the federal law which the state disfavored was the Emergency Price Control Act, a consumer protection measure which provided a triple damage remedy for consumer goods sold in excess of mandated price ceilings. The Supreme Court held that the State could not refuse to entertain such claims, since the State permitted claims for double damages to be brought in its courts for non-payment of overtime. *Id.* Plainly, the federal and state causes of action at issue here, see Appellants’ Br. at 5-9, are much closer in character to each other than those in *Testa*, and the State makes no effort to suggest otherwise.

The State also contends that the Supreme Court’s recent Commerce Clause decisions undermine the *Testa* anti-discrimination principle. Appellee’s Br. at 32-34. However, as we showed in our opening brief, nothing in *Printz v. United States*, 117 S. Ct. 2365 (1997), alters the basic proposition that the Supremacy Clause requires state courts to entertain federal claims analogous to claims that state courts entertain under state law. Indeed, in *Printz*, the Court expressly recognized and reaffirmed, citing *Testa* and *F.E.R.C.* that “state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause (‘the Judges in every state shall

³ In *F.E.R.C. v. Mississippi*, 456 U.S. 742, 776 n.1 (1982). Justice O’Connor described the *Testa* principle as barring discrimination “between analogous federal and state causes of action.” The proposition that the State advances here—that the causes of action need be identical—has no basis in any of the Supreme Court precedents.

be bound [by federal law]’).” 117 S. Ct. at 2381. (brackets in original). The Court took pains to distinguish from that obligation the “obligation” asserted in *Printz*—viz., the “obligation” requiring that “state executive officers must administer federal law” *Id.* And, the latter is not remotely implicated here. *Id.*⁴

The State’s final point in response, without supporting authority, is that there is no discrimination against federal claims here because the federal claim cannot be brought in federal court. Appellee’s Br. at 34. But the Supremacy Clause obligation imposed on state courts to enforce federal law equally with state law is distinct from and unrelated to any Eleventh Amendment limitation on federal jurisdiction. See pp. 7-12 *infra*.

In sum, the State has failed to offer any cogent reason why the anti-discrimination principle of *Testa* does not mandate reversal of the lower court decision.

III. MAINE DOES NOT ENJOY ANY FEDERAL CONSTITUTIONAL IMMUNITY FROM SUIT IN ITS OWN COURTS ON FLSA CLAIMS

The State contends that the Eleventh Amendment expresses—or at the least recognizes—a general state sovereign immunity limit on Congress’ Article I legislative authority, a limit that applies even when the Tenth Amendment limit on Congress’ authority does not. From this it follows, so the State contends, that the State may interpose in its courts a state-law sovereign immunity defense to the enforcement of otherwise valid federal enact-

⁴ The State’s reliance on *Printz*’ predecessor—*New York v. United States*, 505 U.S. 144, 161 (1992)—fares no better. Appellee’s Br. at 32. *New York* did not involve the obligation of state courts to enforce federal law, but rather a federal law obligating state legislative action. And, the Court in upholding the challenge to that law distinguished it from the Supremacy Clause obligation of the state courts and cited *Testa* approvingly. 505 U.S. at 178.

ments, such as the FLSA, whenever the Eleventh Amendment would preclude suit on such claims against the State in federal court.

In this regard the State invokes cases, the most recent of which is *Moody v. Commissioner, Department of Human Services*, 661 A.2da 156 (Me. 1995), which the State claims establish that the Eleventh Amendment bar to suit applies in the Maine courts at least through its incorporation in state law. In our opening brief we showed that this is to greatly over read the decisions in question. Appellants' Br. at 24-29. For present purposes we stand on our earlier showing and meet the State on its ground.

The State's "Eleventh Amendment" contention is a compound of two profound errors. First, the Eleventh Amendment simply has no application to state court proceedings. And beyond that, a state court determination to adopt Eleventh Amendment rules of decision by analogy as part of the state's law of sovereign immunity when a federal cause of action is brought in state court can not trump the Supremacy Clause "no discrimination against federal claims" principle.

(a) The Eleventh Amendment in terms expresses only a limitation on the "Judicial Power of the United States", U.S. Const. Amend. XI, the same phrase that defines the federal judicial power in Article III of the Constitution. The State's reliance on that Amendment here is thus belied by the text. Indeed, the State concedes this essential point, as it must. Appellee's Br. at 34.

Eschewing any "literal" reading of the text, the State asserts—without supporting Supreme Court authority—that the Eleventh Amendment limits on the federal judicial power also create, or embody, a general limit on Congress' Article I legislative power. Appellee's Br. at 34. The Supreme Court has repeatedly rejected that assertion and has repeatedly stated that the Eleventh Amend-

ment goes to questions of federal judicial power and has no application 'o state court actions or to Congress' Article I power to create private causes of action enforceable in the state courts. See, e.g. *Hilton v. South Carolina Pub. Rys Comm'n*, 502 U.S. 197, 204-205 (1991) ("as we have stated on many occasions, 'the Eleventh Amendment does not apply in state courts'"); *Will v. Michigan Department of State Police*, 491 U.S. 58, 63-64 (1989) ("the Eleventh Amendment does not apply in state courts"); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980) (same).

To be sure, the State's brief relies heavily on *Seminole Tribe*. Appellee's Br. at 24-30. But *Seminole Tribe* arose from a federal court proceeding, and presented no issue regarding the import of Eleventh Amendment immunity from suit in federal court for federal causes of action brought in state court. Thus, *Seminole Tribe* is the least likely source for a Supreme Court ruling repudiating the long settled proposition that the Eleventh Amendment does not apply in state court. And, fairly read, *Seminole Tribe* contains no such ruling.

As we emphasized in our opening brief, *Seminole Tribe* in fact repeatedly describes the Eleventh Amendment as a limit on federal judicial power, and nothing more. E.g., "The Eleventh Amendment restricts the judicial power under Article II, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." 116 S.Ct. at 1131-1132; see also, Appellants Br. at 22-23; U.S. Br. at 13-14 & n.4. The State seeks to avoid this seemingly insurmountable barrier in two ways.

First, the State simply mischaracterizes the Court's repeated references to the issue presented—namely the scope of federal jurisdiction—and reads every reference to state sovereign immunity as standing for the proposition that there is an Eleventh Amendment immunity in both federal and state courts. Given the Court's express disclaimers and the fact that *Seminole Tribe* provided no occasion to

delve into the nature of state sovereign immunity in the state courts, this wrenches the passages in question out of context.

The Supreme Court's discussion in *Seminole Tribe* of the general principle of sovereign immunity similarly provides *no* support for the State's contention that there is an across the board immunity to private federal causes of action. The State strings together in its brief the *Seminole Tribe* Court's quotations from *Hans v. Louisiana*, 134 U.S. 1 (1890), *Monaco v. Mississippi*, 292 U.S. 313 (1934), the Federalist No. 81, and John Marshall's observations during the debates on the federal constitution, and cites these quotations as demonstrating the Eleventh Amendment insulates states from suits in their own courts. Appellee's Br. at 24-26. However, as the Supreme Court has previously observed, these authorities *address limits on federal court jurisdiction only* and *not* the nature and extent of Congress' Article I powers or the nature and extent of state sovereign immunity in the state courts:

[The Eleventh] Amendment places explicit limits on the powers of federal courts to entertain suits against a State. The language used by the Court in cases construing these limits, like the language used during the debates on ratification of the Constitution emphasized the widespread acceptance of the view that a sovereign State is never amenable to suit without its consent. But all of these cases, and all the relevant debate, concerned questions of *federal-court* jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts. [*Nevada v. Hall*, 440 U.S. at 420. (Emphasis supplied).]⁵

⁵ In *Nevada v. Hall*, 440 U.S. at 419 n.16, the Court quoted Alexander Hamilton from Federalist No. 81: ("It is inherent in the nature of sovereignty not to be amenable to the suit on an individual without its consent). The State recites the same passage which was

Nothing in *Seminole Tribe* questions—much less repudiates—either *Neveda v. Hall's* reading of these materials or the lesson the Supreme Court has repeatedly drawn—that the Eleventh Amendment does *not* apply in state courts.

(b) Again, the State after making a brave show all but concedes that the Supreme Court law belies its reliance on the Eleventh Amendment as such, and falls back on the declaration that "the principles of state sovereign immunity, as exemplified in the eleventh amendment, apply with equal force in state court." Appellee's Br. at 34.

But this appeal to abstract "principles of state sovereign immunity" avails the State nothing here. For we know that in Maine the principle of state sovereign immunity bows to state legislative enactments creating causes of action that are justiciable in the state courts and that are analogous to FLSA causes of action. And, we know too that where Congress acts within its enumerated powers and creates a cause of action like the FLSA cause of action—which is expressly made justiciable in state courts

also quoted in *Hans v. Louisiana*, 134 U.S. at 13, and *Seminole Tribe*, 116 S. Ct. at 1122. Appellee's Br. at 25. The *Nevada* Court quoted from John Marshall in the Constitutional debates: "I hope that no gentleman will think that a state will be called at the bar of the federal court The intent is to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words." The State cites to related passages from Marshall's comments, also quoted in *Hans*. Appellee's Br. at 26. The *Nevada* Court also quoted from *Hans*: "The state courts have no power to entertain suits by individuals against a state without its consent. Then how does the Circuit Court, having only concurrent jurisdiction, acquire any such power?": the State's brief cites related passages from *Hans*. Appellee's Br. at 26. And the *Nevada* Court quoted from *Monaco v. Mississippi*, 292 U.S.—passages recited or referenced by the State in its brief. State Br. at 25. Finally, Justice Rehnquist's dissent in *Nevada* sought to marshall much of the language that the state recites here in his unsuccessful effort to show that state sovereign immunity was part of the plan of the constitution.

of general jurisdiction—the Supremacy Clause requires state courts to entertain such federal causes of action on an equal footing with analogous state causes of action.

This Supremacy Clause principle does not lose its force where a state court seeks to negate a federal cause of action against the State by applying a state sovereign immunity rule that state law makes *inapplicable* to analogous state law causes of action against the State. Stripped of its verbal veneer, such a state court ruling does not vindicate any neutral rule but is the most blatant kind of discrimination between two causes of action—causes both created by laws binding on the state. In one instance, the enacting body is the state legislature and in the other it is Congress, whose valid laws bind state courts under the Supremacy Clause. That, of course, is just the kind of discrimination against federal law that the Supremacy Clause is designed to preclude.

Not surprisingly then, the Supreme Court precedent points to the conclusion that there is no exception to Supremacy Clause principles for defenses predicated on state sovereign immunity principles. Most recently, in *Reich v. Collins*, 513 U.S. 106-109-110 (1994), for example, the Court observed that states can not deny taxpayers a remedy in their courts for federal constitutional claims for refunds of taxes unlawfully exacted or collected, notwithstanding “the sovereign immunity States traditionally enjoy in their own courts.”

And in *General Oil Co. v. Crain*, 209 U.S. 211 (1908), the Court rejected the notion—on a par with that advanced here by the State—that if an action to vindicate a federal right is barred on Eleventh Amendment grounds in federal court, a State could invoke its own laws to defeat enforcement of that right in state court. “If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by

this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution.” *Id.* at 226.

Crain demonstrates that the answer to the rhetorical question posed by the State in its brief—“should the State have available a defense in state court that was available when the action was brought in the federal forum?” Appellee’s Br. at 31—is that such defenses are impermissible when they would serve to defeat the federal right asserted. *See, also, National Private Truck Council, Inc. v. Oklahoma Tax Comm’n*, 515 U.S. 582, 588 (1995) (State courts cannot “refuse to award relief merely because a federal court could not grant such relief.”)

The Supreme Court has, moreover, affirmed on other occasions and in a variety of contexts, the basic principle that state courts may not impose state-law derived obstacles to the enforcement of federal rights. Thus, the Court held in *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987) that state sovereign immunity doctrines cannot be interposed to defeat the federally derived right to just compensation for a taking of property. *See, also, Ward v. Love County*, 253 U.S. 17 (1920). And, as we suggested in our opening brief, Appellant Br. at 13 n.6, *see also* U.S. Br. at 24, n.9, it is equally the case here that the State’s failure to pay the federally mandated FLSA wages owed works a prohibited deprivation of property without due process if the State may deny any remedy to its employees in its courts.⁶

⁶ Indeed, the Supreme Court’s rationale and holding in such cases as *Reich v. Collins*, *General Oil v. Crain*, *First English*, and *Ward v. Love County* all attest to the inability of the State to claim immunity from a state court suit brought to vindicate a federal right even when the state rule that is invoked does not “discriminate” against the federal cause of action. The supremacy of federal law that is mandated by the Constitution, in other words, is an independent obligation on the States that lies at the heart of our federal union.

CONCLUSION

For all the foregoing reasons, we respectfully submit that the judgment of the Superior Court must be set aside.

DATED: December 8, 1997

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JOHN H. ALDEN, *et al.*,
v. *Petitioners,*
STATE OF MAINE,
Respondent.

On Writ of Certiorari to the
Maine Supreme Judicial Court

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QUESTIONS PRESENTED

1. May a state court refuse to entertain a federal statutory private party cause of action against a State or a state agency—such as the present state employee action against the State of Maine under the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*—on the basis of state sovereign immunity?

2. If a state court may properly refuse to entertain such a federal statutory private party action on the basis of state sovereign immunity in certain circumstances but not in others, may a state court do so in the circumstance in which that court entertains analogous state statutory actions?

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BRIEF FOR PETITIONERS

STATEMENT OF THE CASE

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq.*, in FLSA § 3(d) and (x), 29 U.S.C. § 203(d) and (x), expressly includes the States as "employers" subject to the obligation imposed by § 7, 29 U.S.C. § 207, to compensate covered employees at premium rates for hours worked in excess of the applicable statutory threshold. And, FLSA § 16(b) authorizes employee suits in the state courts and the federal courts to recover "unpaid overtime compensation" and "an additional equal amount as liquidated damages," 29 U.S.C. § 216(b).

In December, 1992, a group of Maine probation officers filed an FLSA suit against the State of Maine in the United States District Court for the District of Maine seeking overtime compensation and liquidated damages. In a bifurcated proceeding, the District Court sustained the probation officers' claim in part, holding that they were "law enforcement" employees, FLSA § 13(b)(20), 29 U.S.C. § 213(b)(20), entitled to overtime pay under the special provisions that apply to such employees, § 7(k), 29 U.S.C. § 207(k), and not, as Maine had contended, "professional" employees exempt from statutory coverage, § 13(a)(1), 29 U.S.C. § 213(a)(1). *See Mills v. Maine*, 839 F. Supp. 551, 552 (D. Me. 1994); 839 F. Supp. 3 (D. Me. 1993).

While the probation officers' federal court action was pending, and before the District Court finally determined the State's precise back pay obligation, this Court decided *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). On the strength of that decision, the District Court dismissed the probation officers' federal court action on Eleventh Amendment grounds, and that ruling was affirmed on appeal. *Mills v. Maine*, 1996 WL 400510 (D. Me. July 3, 1996), *aff'd*, 118 F.3d 37 (1st Cir. 1997).

In August, 1996, just after the District Court's Eleventh Amendment ruling, the probation officers filed this action against the State of Maine in the Superior Court of Cumberland County, Maine, again alleging that the State had violated the FLSA overtime provisions. The Superior Court dismissed the claim as barred by state sovereign immunity despite the probation officers' argument that the "FLSA, as federal law, is supreme under the Supremacy Clause and must be enforced by state courts." Pet. App. 22a.¹

The probation officers filed a timely appeal, raising two main points grounded in the Supremacy Clause.² *First*, state courts must enforce valid federal laws, such as the FLSA, notwithstanding any claim of state sovereign immunity. *Second*, Maine cannot close its courts, on sovereign immunity grounds, to private actions against the State for monetary relief based on a claim under federal law when its courts are open to private actions against the State based on analogous claims under state law.

The Maine Supreme Judicial Court by a 4-2 panel vote affirmed the Superior Court. That court read *Seminole Tribe* to confirm the view—expressed in earlier Maine Supreme Judicial Court decisions³—that the Eleventh Amendment embodies state sovereign immunity as a "background principle" of the federal Constitution that applies beyond the federal courts to bar federal claims advanced in state court where those claims would be barred if brought in federal court. Pet. App. 6a. And,

¹ The State also argued that the probation officers' claim was barred by the statute of limitations. The Superior Court rejected that argument, and the State did not appeal that ruling to the Maine Supreme Judicial Court.

² Appellants' Br. at 9-29; Appellants' Reply Br. generally. J.A. 68-86; 151-63.

³ *Drake v. Smith*, 390 A.2d 541 (Me. 1978); *Thiboutot v. State*, 405 A.2d 280 (Me. 1979), *aff'd on other grounds*, 448 U.S. 1 (1980); *Jackson v. State*, 544 A.2d 291 (Me. 1988), *cert. denied*, 491 U.S. 904 (1989); and *Moody v. Commissioner*, 661 A.2d 156 (Me. 1995).

the Maine Court rejected the probation officers' contention that Maine discriminated against federal causes of action; that court reasoned that no Maine statute authorized the *precise* state employee statutory cause of action the probation officers had stated in their FLSA complaint. Pet. App. 6a-7a.

SUMMARY OF ARGUMENT

I. Among the Article I powers granted to Congress by the Constitution is the power to subject all persons and entities, public and private, to certain rights and obligations with respect to the nature of their activities affecting interstate commerce, and to provide for the enforcement of those rights and obligations through the usual processes of the law. In the case of the Fair Labor Standards Act—the statute at issue here—Congress has chosen to require that certain employees of public and private employers be compensated at a certain rate for overtime work and explicitly to authorize such employees to enforce their rights through the bringing of private actions in the federal and state courts.

After Congress had so acted, this Court in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), held that, because of the Eleventh Amendment, there is no Article III jurisdiction in the federal courts over private party actions against a State or state agency including FLSA overtime pay actions.

But, as this Court reaffirmed in its unanimous opinion in *Howlett v. Rose*, 496 U.S. 356 (1990), federal law is enforceable in state court and the state courts have a corresponding duty to enforce federal law as the "supreme Law of the land." *Howlett* goes on to demonstrate that state sovereign immunity rules—no more than other state rules affecting the conduct of litigation in state courts—cannot block the enforcement of federal rights in state courts when Congress has authorized such an enforcement action and the interposition of state law would

frustrate the federal goal of providing for effective enforcement.

And, nothing in this Court's Eleventh Amendment jurisprudence, as reflected in a line of decisions culminating in *Seminole Tribe*, is inconsistent with this important principle. The Eleventh Amendment establishes a limit on the jurisdiction of the federal courts to hear and decide actions against an unconsenting State or state agency and, by reason of the separation of powers principle, on Congress' power to provide for any such head of federal court jurisdiction. Unlike private persons (or state subdivisions), a State or state agency may always opt to be sued *not* in the federal judicial system but in the more familiar setting of its own judicial system.

Apart from the Article III/Eleventh Amendment state sovereign immunity rule that limits federal court jurisdiction, there is no constitutional state sovereign immunity barrier to Congress' power to provide for the enforcement against the States of a constitutionally proper enactment, including enforcement through private party suits against a State in a state court. That is demonstrated by a range of decisions in this Court, including *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991) (relating to the enforcement of a federal right in a state court) and *Nevada v. Hall*, 440 U.S. 410 (1978) (relating to a suit against a State in the courts of another State). Moreover, other decisions of this Court, including *Reich v. Collins*, 513 U.S. 106 (1994), indicate that the failure of a State to afford redress when required in order to remedy a federal wrong would raise the most serious questions under the Due Process Clause of the Fourteenth Amendment.

II. Even assuming that there are circumstances in which a state court may refuse to entertain an action brought to enforce a federal right by application of a rule that treats all litigants in similar fashion—an assumption that does not hold in any event when, as here, the state rule operates to frustrate an overriding federal purpose—it is well established that a State may not choose to discriminate

among litigants on the basis that federal law furnishes their underlying right. See, e.g., *Testa v. Katt*, 330 U.S. 386 (1947); *Howlett v. Rose*, *supra*.

In the present case, the State of Maine has done exactly that. At the very time when the Maine courts choose to honor the defense of sovereign immunity to a claim for wages owing under federal law, the state courts consistently allow state employees to bring state statutory law actions against their employers for damages, including wages owed. While the Maine Supreme Judicial Court sought to evade this discrimination by noting that state law as a substantive matter does not provide for actions of the precise type authorized by the FLSA, an analysis of the state law shows beyond any doubt, that the state employee actions that the state courts do hear and decide are so closely analogous as to be functionally indistinguishable from the action brought here. And as *Testa v. Katt* makes clear, unconstitutional discrimination is shown when the state courts entertain state law actions "of the same type" as those sought to be pursued under federal law.

ARGUMENT

I. A State Court May Not Refuse To Entertain A Federal Statutory Private Party Cause Of Action Against A State—Such As The Present State Employee Action Against The State Of Maine Under The Overtime Provisions Of The Fair Labor Standards Act—On The Basis Of State Sovereign Immunity.

Article I of the Constitution of the United States grants the Congress a set of enumerated plenary legislative powers. These include the Article I, § 8 power to enact federal laws of general application, such as the Fair Labor Standards Act, regulating aspects of the economic life of the Nation. As this Court has held, this commerce clause power authorizes Congress to extend such economic regulations to the States *qua* employers and as part of the class of employers whose hiring and compensation decisions affect interstate commerce. And, by the force of Article VI, such laws are the “supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”

Congress, likewise, has the Article I power, as a general matter, to make the rights declared in federal enactments enforceable by private party right-holders in the state courts of general jurisdiction. And, when Congress exercises that legislative power, the constitutional plan dictates that the state courts, again as a general matter, have a concomitant obligation, made manifest in the Supremacy Clause, to entertain, and to adjudicate, such federal-rights suits, and to do so in conformity with federal law, including federal law that preempts conflicting state law.

When Congress exercises its Article I power to make the rights declared in an economic regulation of general application, such as the FLSA, enforceable against a State by a private-party right-holder in state court the question then arises—and it is the question here—whether that exercise of power is barred by the state sovereign immunity doctrine.

By reason of Congress’ restraint in enacting economic regulations that bear directly on the States, and of the preference of suitors for vindicating federal statutory rights in the federal courts, this Article I/state sovereign immunity question is, so far as our researches show, a question that this Court has not yet directly addressed.

But precedent and first constitutional principles offer substantial guidance, and in light of both, it is our submission that the Constitution vouchsafes to Congress the Article I power exercised here and that this federal sovereign authority is not defeated by state sovereign immunity.

In making that submission, we begin with the federal statute at issue here, the FLSA, and trace its evolution to the 1966 and 1974 amendments extending its norms to the States and providing in clear, explicit terms for state employee wage suits against the States in state court.

We then turn to this Court’s decisions in *Garcia v. San Antonio Metro. Transit Auth. (SAMTA)*, 469 U.S. 528 (1985), and in *Howlett v. Rose*, 496 U.S. 356 (1990), to establish the essential predicates of our position:

- First, as to *Garcia*, that Congress in extending the FLSA to the States acted within its constitutional authority and in a manner consistent with the state sovereignty constraints on its law-making powers;
- And second, as to *Howlett*, that Congress, as a general matter, has the authority to make FLSA rights enforceable in the state courts of general jurisdiction and that those courts have an obligation to hear, and decide, such federal rights causes of action—an obligation that preempts state rules that would frustrate the effectuation of federal purposes.

Finally we demonstrate that *Howlett*’s preemption analysis governs where a federal law actionable in state court provides for state liability and the State would preclude liability by invoking state sovereign immunity. In so doing we show that Congress’ authority to provide for such suits to enforce a right stated in an otherwise constitutional

federal law is not circumscribed by any state sovereign immunity rule established by the Constitution itself.

A

In a number of contexts this Court has insisted that where Congress acts in "traditionally sensitive areas, such as [by enacting] legislation affecting the federal balance, and in so doing intends to pre-empt the historic powers of the States," or to otherwise "alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (internal quotations and citations omitted).

The evolution of the FLSA, in response to changing economic conditions—and most particularly to the growth of public employment—as well as to this Court's rulings over the last quarter century, confirms that Congress unmistakably intended to authorize public employees, including state employees, to bring wage suits against public employers, including state employers, to redress violations of their FLSA rights.

1. The FLSA, as originally enacted in 1938, applied only to private sector employers and employees and not to the public sector—federal, state or local. *See* 29 U.S.C. § 203(d) (1940) (excluding States and their political subdivisions from the definition of "employer"). "The central aim of the Act was to achieve, in those industries within its scope, certain minimum labor standards." *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). To that end, the FLSA sought to "raise substandard wages first by a minimum wage and then by increased pay for overtime work," and thereby "to have an appreciable effect in the distribution of available work." *Overnight Motor Co. v. Missel*, 316 U.S. 572, 577, 578 (1942).

In 1966, Congress expanded FLSA coverage, including for the first time, certain federal, state and local public sector employers and employees. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 831,

29 U.S.C. §§ 203(a), 203(r)(1), 203(s)(4), 218 (1970). In extending coverage to "some 7.2 million workers, many of whom are among the lowest paid workers in the country," Congress recognized that "long working hours and wages which barely provide subsistence are still a daily way of life for far too many of our citizens." S. Rep. No. 1487, 89th Cong., 2d Sess. at 2 (1966).

Federal and state employees made up slightly less than 20% of the employees covered by the FLSA through the 1966 amendments. *Id.* at 2, 6 (chart). The state employees newly covered were chiefly those employed by state operated hospitals and schools, including state institutions of higher education. (These amendments also broadened the coverage of private sector hospitals and schools.) These state facilities were included among the "enterprises" defined as engaged in commerce or production for commerce, and in the corresponding definition of "employer." Congress did not, however, amend FLSA § 16(b), which provided simply that employee wage actions "may be maintained in any court of competent jurisdiction."

2. In *Employees v. Missouri Public Health Department*, 411 U.S. 279, 285 (1973), this Court held that since Congress had not amended FLSA § 16(b) to provide expressly for federal court state employee wage suits against a State, the States retained their Eleventh Amendment immunity to such actions in federal court.⁴ The Court added that the amendments were not thereby rendered "meaningless" since FLSA § 16(c) authorized the Secretary of Labor to bring wage suits on the employees' behalf in federal court and since § 16(b) "arguably . . . permits [employee] suits in the Missouri courts." *Id.* at 285-287.⁵ Indeed, Justice Marshall's concurring opinion, joined by Justice Stewart, read § 16(b) as plainly and

⁴ The Court noted also that it "found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts." 411 U.S. at 285.

⁵ The Court noted that the question of state amenability to suit in state court was "a question we need not reach. We are con-

properly authorizing state employee wage suits in state courts:

[Through the 1966 amendments], Congress created in these [state] employees a federal right to recover from the State compensation owing under the Act. While constitutional limitations upon the federal judicial power bar a federal court action by these employees to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights. See *Testa v. Katt*, 330 U.S. 386 (1947). See also *General Oil Co. v. Crain*, 209 U.S. 211 (1908). For Missouri has courts of general jurisdiction competent to hear suits of this character, and the judges of those courts are co-equal partners with the members of the federal judiciary in the enforcement of federal law and the Federal Constitution, see *Martin v. Hunter's Lessee*, 1 Wheat, 304, 339-340 (1816). Thus, since federal law stands as the supreme law of the land, the State's courts are obliged to enforce it, even if it conflicts with state policy, see *Testa v. Katt*, *supra*, at 392-394; *Second Employers Liability Cases* [*Mondou v. New York, N.H. & H.R. Co.*], 223 U.S. 1, 57-58 (1912). [411 U.S. at 297-298.]

3. In 1974, Congress again amended the FLSA, both to broaden its coverage of private sector employers and employees and of federal, state and local public sector employers and employees, and to make plain its intention to provide for public employee wage suits against public employers. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 58, 29 U.S.C. §§ 203(d), 203(r)(3), 203(s)(5), 203(x), 216(b). Congress estimated that the amendments extended coverage to about 5,000,000 federal, state and local government employees, including all otherwise non-exempt (non-professional, executive or administrative) employees "in all civilian branches of the Federal Government." H.R. Rep. No. 93-913, 93d Cong., 2d Sess. at 26 (1974).

cerned only with the problem of this Act and the constitutional constraints on the 'judicial power' of the United States." *Id.* at 287.

Through these amendments Congress sought "to extend the Act's coverage in such a manner as to completely assume the Federal responsibility insofar as is presently practicable and to raise the minimum wage to a level which will prevent the disgraceful and intolerable situation of workers and their families dwelling in poverty." H.R. Rep. No. 93-913, at 8.

To that end, Congress amended, *inter alia*, FLSA § 3(d) to include "public agenc[ies]" among the employer entities defined as "employers", § 3(e) to include "employees of public agencies" among the employees covered by the Act, subject to certain exceptions, and added a new § 3(x) to define "public agency" to include, along with other public employers, "the Government of the United States; [and] the government of a State or political subdivision thereof." 29 U.S.C. §§ 203(d), 203(e), 203(x). In recognition of the unique character of public law enforcement and public fire prevention, Congress also added a new § 7(k), which provided an alternative, and more flexible statutory basis for determining when police officers and fire prevention personnel are entitled to overtime compensation. 29 U.S.C. § 207(k).

In addition, Congress amended FLSA § 16(b) to provide that an "action to recover [an FLSA wage] liability . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). As House Report No. 93-913 states, "Section 16(b) of the Act is amended to make it clear that suits by public employees to recover unpaid wages and liquidated damages under such section may be maintained in a Federal or State court of competent jurisdiction" and in that way to meet the "clear statement" of intent requirement of the *Missouri Employees* decision. *Id.* at 42.

4. The 1974 FLSA amendments, insofar as they extended the Act to the States and their subdivisions, gen-

erated a substantial constitutional question with respect to Congress' commerce clause power to extend economic regulations of general application, such as the FLSA, to state employers. That question was resolved in this Court's *Garcia v. San Antonio Metro. Transit Auth. (SAMTA)* decision. See pp. 12-13, *infra*.

In the wake of *Garcia*, Congress enacted Fair Labor Standard Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 878. The 1985 amendments, without "retreating from the principles established by Congress in the 1966 and 1974 FLSA amendments," sought to "fairly accommodate[]" the "particular needs and circumstances of the States and their Political subdivisions." S. Rep. No. 99-159, 99th Cong., 1st Sess. at 7 (1985). In particular, the 1985 amendments provide public sector employers with the option, under specified circumstances, of compensating employees for overtime through compensatory time-off rather than added compensation—an option that is not available to private sector employees.

In sum, the statutory text, its legislative history, and its evolution demonstrate that the Congress, after prolonged and mature deliberation, reached the considered judgment—stated in clear, express terms—to extend the FLSA's norms to the Federal Government and to the States and their subdivisions as employers—with ameliorating adjustments to those norms to take account of their governmental status—and, as a means of enforcing those norms, to provide for public employee wage suits against public employers.

B

Garcia v. San Antonio Metro. Transit Auth. (SAMTA), *supra*, upholds the constitutionality of the extension of the FLSA minimum wage and overtime requirements to the States and state subdivisions. In so doing, the Court emphasized that a covered public employer, like SAMTA, "faces nothing more than the same minimum wage and overtime obligations that hundreds of thousands of other

employers, public as well as private, have to meet." 469 U.S. at 554. And, in reaching its conclusion, the *Garcia* Court was guided by two aspects of the constitutional plan that set the framework for considering the question presented here.

First, "the sovereignty of the States is limited by the Constitution itself"—most notably by Article I, § 8, which works a "sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation." 469 U.S. at 548. Thus, while "States unquestionably do 'retai[n] a significant measure of sovereign authority,' . . . [t]hey do so . . . only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." 469 U.S. at 549 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 269 (Powell, J., dissenting)).

Second, except for provisions "like the guarantee, in Article IV, § 3, of state territorial integrity, the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace. . . . [T]he fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies." 469 U.S. at 550.

C

This Court's precedents establish as well that Congress acts within its constitutionally enumerated powers and in accord with the constitutional plan in providing for the enforcement of federal statutory rights in the state courts as well as in the federal courts.

There can be no dispute as to Congress' basic commerce clause power to provide for the enforcement of a federal enactment by authorizing a damage action by a person

injured by violation of the statutory norms. As Justice Holmes put the point in an early Sherman Act case: "There can be no doubt that Congress had power to give an action for damages to an individual who suffers by breach of the law. . . . In other words, if Congress had power to make the acts which led to the damage illegal, it could authorize a recovery for the damage" *Chattanooga Faculty & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396-97 (1906) (citations omitted).

There likewise can be no dispute as to the constitutional plan regarding the role of the state courts where Congress has provided for private party federal statutory actions in those courts. This Court's unanimous opinion in *Howlett v. Rose*, *supra*, states the governing principle:

Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum—although both might well be true—but because the constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. "The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent." *Clafin v. Houseman*, 93 U.S. 130, 136-137 (1876) [496 U.S. at 367 (citations omitted).]

As the Court added in *Printz v. United States*, 117 S. Ct. 2365 (1997)—in distinguishing the role of the state courts from that of the state executive and the state legis-

lature in enforcing federal law—this understanding that the Constitution "permit[s] imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions relate[] to matters appropriate for the judicial power" was "perhaps implicit" in Article III and was "explicit" in the Supremacy Clause:

In accord with the so-called Madisonian Compromise, Article III, § 1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress—even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States. . . . And the Supremacy Clause, Art. VI, cl. 2, announced that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns at the time. The principle underlying so-called "transitory" causes of action was that laws which operated elsewhere created obligations in justice that courts of the forum state would enforce. . . . The Constitution itself, in the Full Faith and Credit Clause, Art. IV, § 1, generally required such enforcement with respect to obligations arising in other States. [117 S. Ct. at 2371 (emphasis in original) (citations omitted).] ⁶

⁶ See also *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2037 (1997) (opinion of Kennedy, J.) ("Interpretation of federal law is the proprietary concern of state, as well as federal, courts. It is the right and duty of the States, within their own judiciaries, to interpret, and to follow the Constitution and all laws enacted pursuant to it The Constitution and laws of the United States are not a body of law external to the States, acknowledged and enforced simply as a matter of comity. The Constitution is the basic law of the Nation The separate States and the Government of the United States are bound in the common cause of preserving the whole constitutional order. Federal and state law 'together form one system of jurisprudence.' *Clafin v. Houseman*, 98 U.S. 130, 137 (1876).").

The overarching principle stated in *Howlett* does not, of course, exhaust the complexity of the matter or expose the nuances of state court enforcement of federal law. *Howlett* summarizes the law as it stands in those regards "[t]hree corollaries [that] follow from the proposition that 'federal' law is part of the 'Law of the Land' in the State"—corollaries that are "fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law." 496 U.S. at 369, 372-73. The first is that

A state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of "valid excuse." *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377, 387-388 (1929) (Holmes, J.). "The existence of the jurisdiction creates an implication of duty to exercise it." *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 58 (1912) [496 U.S. at 369 (citations omitted).]

The second corollary follows from the first and states the basic limit on the "valid excuse" concept:

An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source. "The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of [the State] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State." *Mondou*, 223 U.S., at 57 [496 U.S. at 371 (citations omitted).]

And, the third corollary sets out the "neutral state rule of administration" precept:

When a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, we must act with utmost caution before deciding that it is obligated to entertain the claim. . . . The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule, "bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Hart, [The Relations Between State and Federal Law,] 54 Colum. L. Rev. [489,] 508 [(1954)] The States thus have great latitude to establish the structure and jurisdiction of their own courts. . . . In addition, States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law. [496 U.S. at 372 (citations omitted).]

Howlett then goes on to elaborate on the second and third of these corollaries and on their interrelation by focusing on the force and effect of federal law liability rules on state law immunities where a federal statutory rights suit is brought in state court. In so doing *Howlett* begins from the settled proposition that the "elements of, and the defenses to, a federal cause of action are defined by federal law." 496 U.S. at 375. That being so,

"Municipal defenses—including an assertion of sovereign immunity—to a federal right of action—are, of course, controlled by federal law." *Owen v. City of Independence*, 445 U.S. [622], 647, n.30 [(1980)]. "By including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and laws, Congress—the supreme sovereign on matters of federal law—abolished whatever

vestige of the State's sovereign immunity the municipality possessed." *Id.*, at 647-648 (footnote omitted). [496 U.S. at 376.]

At that juncture *Howlett* traces the Court's application of the rule stated in *Owen* first in *Martinez v. California*, 444 U.S. 277 (1980), and then in *Felder v. Casey*, 487 U.S. 131 (1988). *Howlett* notes that in *Martinez* the Court

unanimously concluded that a California statute that purported to immunize public entities and public employees from any liability for parole release decisions was pre-empted by § 1983 "even though the federal cause of action [was] being asserted in the state courts." *Id.*, at 284. We explained:

"Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985(3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. See *McLaughlin v. Tilendis*, 398 F.2d 287, 290 (7th Cir. 1968). The immunity claim raises a question of federal law.' *Hampton v. Chicago*, 484 F.2d 602, 607 (CA7 1973), cert. denied, 415 U.S. 917." *Id.*, at 284, n.8. [496 U.S. at 376-77.]

And, *Howlett* adds that in *Felder v. Casey* the Court

followed *Martinez* and held that a Wisconsin notice-of-claim statute that effectively shortened the statute of limitations and imposed an exhaustion requirement on claims against public agencies and employees was pre-empted insofar as it was applied to § 1983 actions. . . . We concluded: "The decision to subject state subdivisions to liability for violations of federal rights . . . was a choice that Congress, not the Wisconsin Legislature, made, and it is a decision that the

State has no authority to override." *Id.*, at 143. [496 U.S. at 377.]⁷

Against this background, the *Howlett* Court ruled:

Federal law makes governmental defendants that are not arms of the State, such as municipalities, liable for their constitutional violations. . . . Florida law, as interpreted by the District Court of Appeal, would make all such defendants absolutely immune from liability under the federal statute. To the extent that the Florida law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law. "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). [496 U.S. at 377-78.]

Howlett, then, recognizes that after the adoption of the Constitution, as before, each State and its subdivisions possess state sovereign immunity to the extent established by the State's common law, its constitutional law or its statutory law. *Howlett* recognizes as well that nothing in the Constitution affects those rules of state sovereign immunity where the cause of action is a non-federal cause of action. At the same time, *Howlett* holds that by reason of the Supremacy Clause, when Congress makes a federal law enforceable in the state courts and provides therein for state subdivision liability, the federal law preempts any conflicting state rule of state sovereign immunity.⁸

⁷ Other decisions, like *Felder v. Casey*, support *Howlett's* recognition that when state litigation rules conflict with the effectuation of a valid federal purpose, the state rules must yield. See, e.g., *Dice v. Akron, C. & Y.R. Co.*, 342 U.S. 359 (1952); *Liner v. Jafco, Inc.*, 375 U.S. 301 (1964).

⁸ We note that after taking its preemption analysis of the municipality's state sovereign immunity claim to the conclusion outlined

Howlett and the instant case, of course, do not arise in identical legal contexts. The federal enactment at issue

above, the *Howlett* Court considered and rejected the alternative arguments (i) that state sovereign immunity law is the "kind of neutral policy that could be a 'valid excuse' for the state court's refusal to entertain federal actions," 496 U.S. at 379; and (ii) that federal law cannot "compel a state court to entertain a claim over which the state court has no jurisdiction as a matter of [the] state law [of sovereign immunity]," *id.* at 381.

In this case, the State of Maine has not invoked either the "valid excuse" rule or any "absence of state court jurisdiction" rule. We therefore relegate these portions of *Howlett's* rationale to the summary that follows. As to "valid excuse" *Howlett* states:

To the extent that the Florida rule is based upon the judgment that parties who are otherwise subject to the jurisdiction of the court should not be held liable for activity that would not subject them to liability under state law, we understand that to be only another way of saying that the court disagrees with the content of federal law. There is no question that the Circuit Court, which entertains state common-law and statutory claims against state entities in a variety of their capacities . . . has jurisdiction over the subject of this suit. That court cannot reject petitioner's § 1983 claim because it has chosen, for substantive policy reasons, not to adjudicate other claims which might also render the school board liable. The federal law is law in the State as much as laws passed by the state legislature. A "state court cannot 'refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers.'" *Testa [v. Katt]*, 330 U.S. [386,] 393 [(1947)] (quoting *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. [211], 222 [(1916)]). [496 U.S. at 379-80.]

As to state court "jurisdiction" over federal statutory causes of action, *Howlett* adds:

The fact that a rule is denominated jurisdictional does not provide a court an excuse to avoid the obligation to enforce federal law if the rule does not reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect. It is settled that a court of otherwise competent jurisdiction may not avoid its parallel obligation under the Full Faith and Credit Clause to

in *Howlett* was a civil rights act (42 U.S.C. § 1983), based in part on the Fourteenth Amendment, and § 1983 covers, and provides a liability rule applicable to, state subdivisions but not the States themselves. The federal enactment here, in contrast, is an Article I, § 8 commerce clause economic regulation that, *inter alia*, covers, and provides a liability rule applicable to, both state subdivisions and the States themselves. And, of course, for Article III/Eleventh Amendment state sovereign immunity doctrine purposes these are distinctions that make a legal difference. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65-66 (1996) (discussing the Fourteenth Amendment/Article I distinction) and *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 680-81 (1978) (discussing the State/state subdivision distinction).

But, as we have seen, nothing in *Howlett's* analysis of the force and effect of the federal liability rule there at issue on the state sovereign immunity rule invoked by the state subdivision turned on the Fourteenth Amendment nature of the federal enactment or the particular place of state subdivisions in the federal hierarchy. To the contrary, *Howlett* is based on fundamental Supremacy Clause principles that in their terms apply equally to the force and effect of Article I enactments and to the force and effect of Fourteenth Amendment enactments on the States and on state subdivisions.

It is thus our submission that the fundamental Supremacy Clause principles stated in *Howlett* and applied there govern here as well. And, retracing the *Howlett* analysis and applying it here shows that in enacting a

entertain another State's cause of action by invocation of the term "jurisdiction." . . . Similarly, a State may not evade the strictures of the Privileges and Immunities Clause by denying jurisdiction to a court otherwise competent. . . . [T]he same is true with respect to a state court's obligations under the Supremacy Clause. The force of the Supremacy Clause is not so weak that it can be evaded by mere mention of the word "jurisdiction." [496 U.S. at 38-83 (citations and footnotes omitted).]

constitutionally proper economic regulation applicable to the States and in providing a state employee federal cause of action against the State for a State violation of the statutory norms, Congress has "most assuredly determined that the States shall be subject to liability for violations of that federal law." That being so, a State's defenses to this federal rights cause of action that are akin to the municipality's defense in *Howlett*—including an assertion of state sovereign immunity—"are controlled by federal law." And, of course, Congress is as much "the supreme sovereign on matters of federal law" affecting the States as on matters of federal law affecting state subdivisions.

It follows that a determination by Congress to make a State liable for a violation of a federal statute under a federal cause of action brought in state court preempts the State's law that immunizes the State from any such liability. "To the extent that the [state] law of sovereign immunity reflects a substantive disagreement with the extent to which government entities should be held liable for their [federal statutory] violation, that disagreement cannot override the dictates of federal law."

D

To be explicit on an obvious—but critical—point, our reliance on *Howlett* and its predecessors—and on the Supremacy Clause in establishing the priority of federal law liability rules over state sovereign immunity rules—rests on the premise that the state sovereign immunity invoked by the State in this case, like the state sovereign immunity invoked by the municipality in *Howlett*, is an immunity provided by the laws of the State, *not* an immunity provided by the Constitution itself and secured thereby against preemption by a federal statutory liability rule. That premise rests on the Constitution and on the decisions of this Court interpreting the Constitution.

At the threshold, it is plain that nothing in the constitutional text purports to afford the States a state sov-

ereign immunity that places an absolute general limit on Congress' enumerated legislative powers. Nor can the Constitution be said to provide for any such limit by fair implication. Rather, under the constitutional scheme Congress is sovereign in exercising its enumerated powers—including its power to extend to the States the norms stated in economic regulations of general application. Those grants of legislative power necessarily limit the sovereignty of the States. In the absence of a clear counter indication, it follows ineluctably that Congress' sovereign legislative power, by its nature, includes the power to make its laws enforceable by providing for state liability for state violations and by negating any state immunity rooted in the common law of any particular State, or in its state statutory law, or in its state constitutional law.

In so stating we do not seek to reopen, or to reargue, the issues recanvassed most recently in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). For *Seminole Tribe's* rationale and holding strengthen—albeit by negative implication—our position here that there is *no* constitutional principle of state sovereign immunity that works any absolute general limitation on Congress' Article I powers.

Seminole Tribe reestablishes that "the Eleventh Amendment [stands] for the constitutional principle that sovereign immunity limit[s] the *federal courts'* jurisdiction under Article III." 517 U.S. at 64 (emphasis added). In this regard the Court noted:

The text of the Amendment itself is clear enough on this point: "The Judicial power of the United States shall not be construed to extend to any suit" And our decisions since *Hans* had been equally clear that the Eleventh Amendment reflects "the fundamental principle of sovereign immunity [that] limits the grant of *judicial authority in Art. III*," *Pennhurst State School and Hospital v. Halder-*

man, 465 U.S. 89, 97-98 (1984); see [*Pennsylvania v. Union Gas Co.*, 491 U.S. 1] 38 [(1989)] ("[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given . . .") (SCALIA, J., dissenting) (quoting *Ex parte New York*, 256 U.S. 490, 497 (1921)) . . . [517 U.S. at 64-65 (emphasis added) (citation omitted).]

Seminole Tribe then goes on to

reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. *The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.* [517 U.S. at 72-73 (emphasis added; footnote omitted).]

In the course of its discussion of Article III jurisdiction, the Court made special mention of "the [recorded] views of Marshall, Madison and Hamilton . . . [t]he most natural reading of which would preclude all *federal jurisdiction* over an unconsenting State." 517 U.S. at 70 (emphasis added). These views—in common with the other portions of the record on the adoption of the Constitution and the adoption of the Eleventh Amendment that speak to state sovereign immunity cited in *Seminole Tribe*—provide no support for the thesis that there is an absolute general constitutional state sovereign immunity limit on Congress' Article I powers.⁹ The proponents of the state

⁹ During the Virginia debate on the ratification of the Constitution both Madison and Marshall directed their remarks to the

sovereign immunity limitation on the jurisdiction of the federal courts stated their case in terms of the need to place a limitation on Article III to negate the power of those courts to hear and decide common law causes of action against the States—most particularly those concerning the States' unpaid Revolutionary War debts. So far as we are aware, none of the proponents argued for any limit on Article I that would provide a constitutional guarantee immunizing the States from all private party suits based on, and authorized in, federal statutes.

As all the foregoing makes clear, the *only* state sovereign immunity principle recognized in *Seminole Tribe* is an immunity principle incorporated into *Article III as clarified by the Eleventh Amendment* to effectuate a limitation on the enumerated heads of the *federal courts'* Article III jurisdiction. *Seminole Tribe* does not stand for the proposition that there is any more far-reaching constitutional principle of state sovereign immunity that limits Congress' Article I powers to enact federal rights and provide for the enforcement of those rights.

Article III jurisdiction of the federal courts. Thus Madison began by stating that "[the Article III] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason," and then argued for the proposition that Article III means only that "if a state should wish to bring a suit against a citizen, it must be brought before the federal courts." 3 The Debates in the Several State Conventions of the Adoption of the Federal Constitution 530 (J. Elliot ed. 1866). Marshall, in supporting Madison's thesis, began "with respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence" and then argued that "I hope that no gentlemen will think that a state will be called at the bar of the federal court." *Id.* at 555-556 (emphasis in original). Finally, in the Federalist No. 81, Hamilton directed his remarks to rebutting the "suggest[ion] that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation."

Seminole Tribe, rather, invokes the rule that "Article III . . . set[s] forth the exclusive catalog of permissible federal-court jurisdiction" and that, as a matter of the separation of powers, Congress cannot "under Article I expand the scope of the federal courts' jurisdiction under Article III."

That most emphatically is not a rule stripping Congress of its Article I power to provide for private party federal statutory actions against the States in state court. On the contrary, the essence of the Eleventh Amendment, and of the cases construing it, is that by imposing a limitation on the judicial authority of the federal courts, the Constitution gives to each State a choice of forum that no private party possesses—the choice (regardless of the plaintiff's preference) of defending a claim of federal right made against the State not in the federal judicial system but in the familiar setting of its own judicial system.

That Article III/Eleventh Amendment state sovereign immunity goes no further is confirmed not only by the reasoning of—and sources relied upon in—*Seminole Tribe*, but equally by a long line of cases in which the Court has "stated on many occasions, [that] 'the Eleventh Amendment does not apply in state courts,' *Will*, 491 U.S. at 63-64, citing *Maine v. Thiboutot*, 448 U.S. 1, 9, n.7 (1980); *Nevada v. Hall*, 440 U.S. 410, 420-421 (1979)." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 204-205 (1991).¹⁰

¹⁰ See also *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-240 n.1 (1985), where the Court responded to the claim that "in the absence of jurisdiction in the federal courts, the States are 'exemp[t] . . . from compliance with laws that bind every other legal actor in our Nation'" as follows:

This claim wholly misconceives our federal system. As JUSTICE MARSHALL has noted, "the issue is not the general immunity of the States from private suit . . . but merely the

Of the precedents cited in *Hilton, Nevada v. Hall* is of particular significance. That case concerned "a tort action [filed in the California courts by California residents, and naming the State of Nevada as a defendant] arising out of an automobile collision in California" between an automobile driven by the plaintiffs and an automobile driven by "an employee of the University of Nevada, . . . and owned by the State, [who] was engaged in official business [on behalf of] the University [which] is an instrumentality of the State itself." 440 U.S. at 411-412.

In this Court, Nevada argued "that California is not free, as a sovereign, to apply its own law, but is bound instead by a federal rule of law implicit in the Constitution that requires all of the States to adhere to the sovereign-immunity doctrine as it prevailed when the Constitution was adopted." 440 U.S. at 418. This Court concluded that there is *no* such "federal rule of law implicit in the Constitution." In so doing, the Court stated in relevant part:

Unquestionably the doctrine of sovereign immunity was a matter of importance in the early days of independence. Many of the States were heavily indebted as a result of the Revolutionary War. They were vitally interested in the question whether the creation of a new federal sovereign, with courts of its own, would automatically subject them, like lower English lords, to suits in the courts of the "higher" sovereign.

* * *

susceptibility of the States to suit before federal tribunals." *Employees v. Missouri Dept. of Public Health and Welfare*, *supra*, [411 U.S. 279] at 293-294 (concurring in result) (emphasis added). It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land. See *Martin v. Hunter's Lessee*, 1 Wheat. 304, 341-344 (1816). See also *Stone v. Powell*, 428 U.S. 465, 493, n.35 (1976), and *post*, at 256, n.8.

The debate about the suability of the States focused on the scope of the judicial power of the United States authorized by Art. III. In the *Federalist*, Hamilton took the position that this authorization did not extend to suits brought by an individual against a nonconsenting State. The contrary position was also advocated and actually prevailed in this Court's decision in *Chisholm v. Georgia*, 2 Dall. 419.

The *Chisholm* decision led to the prompt adoption of the Eleventh Amendment. That Amendment places explicit limits on the powers of federal courts to entertain suits against a State.

The language used by the Court in cases construing these limits, like the language used during the debates on ratification of the Constitution, emphasized the widespread acceptance of the view that a sovereign State is never amenable to suit without its consent. But all of these cases, and all of the relevant debate, concerned questions of federal-court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts. These decisions do not answer the question whether the Constitution places any limit on the exercise of one's State's power to authorize its courts to assert jurisdiction over another State. Nor does anything in Art. III authorizing the judicial power of the United States, or in the Eleventh Amendment limitation on that power, provide any basis, explicit or implicit, for this Court to impose limits on the powers of California exercised in this case. [440 U.S. at 418-21 (footnotes omitted).]

Nevada v. Hall thus provides the strongest support for our position here. In the end, the State of Maine can prevail in this case only if the Constitution itself places an absolute general state sovereign immunity limit on Congress' Article I law making powers, just as the State of Nevada could prevail only if the Constitution itself "requires all of

the States to adhere to the sovereign immunity doctrine as it prevailed when the Constitution was adopted," 440 U.S. at 418.

Nevada v. Hall holds that nothing in the constitutional debates on state sovereign immunity, nothing in the Constitution's language and structure, and nothing in this Court's state sovereign immunity decisions "provide any basis, explicit or implicit" for imposing a constitutional state sovereign immunity "limit" on the judicial "powers of California" to hear and decide a case against the State of Nevada "exercised in [that] case." 440 U.S. at 421. It is equally true that nothing in these constitutional materials provides any basis, explicit or implicit, for imposing a constitutional state sovereign immunity limit on the Article I powers of Congress exercised here.

There is a second, and discrete, line of cases which is relevant here as well—the line in which this Court has made it clear that when the federal right sought to be vindicated by a state court action against a state entity or officer is the right against the exaction of state taxes in violation of the laws or Constitution of the United States, the State may not interpose state sovereign immunity as a bar, even assuming that the defense would be available were the state court action brought to vindicate a state law right. See *Reich v. Collins*, 513 U.S. 106 (1994); *Ward v. Board of Comm'rs of Love Cty.*, 253 U.S. 17 (1920); *General Oil Co. v. Crain*, 209 U.S. 211 (1908).¹¹ As the Court stated in *Reich v. Collins*:

[In the Georgia Supreme Court, Reich contended that] even if the Georgia tax refund statute does not

¹¹*Cf. First Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 316 n.9 (1987) (holding that state courts must provide a damage remedy for temporary takings of property which deny all use to the owner, and in so doing rejecting the argument that "the prohibitory nature of the Fifth Amendment . . . combined with principles of sovereign immunity" preclude requiring state courts to afford such relief against States).

require a refund, federal due process does—due process, that is, as interpreted by *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18 (1990), and the long line of cases upon which *McKesson* depends. See *id.*, at 32-36, citing *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239 (1931); *Montana Nat. Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Ward v. Board of Comm'rs of Love Cty.*, 253 U.S. 17 (1920); *Atchison, T. & S. F. R. Co. v. O'Connor*, *supra*; see generally Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1733, 1824-1830 (1991). As we said, these cases stand for the proposition that “a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment,” *Carpenter*, *supra*, at 369, the sovereign immunity States traditionally enjoy in their own courts notwithstanding. (We should note that the sovereign immunity States enjoy in federal court, under the Eleventh Amendment, does generally bar tax refund claims from being brought in that forum. See *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459 (1945).) [513 U.S. at 109-10.]

As the Court had explained in *Ward v. Love County*, relied on in *Reich v. Collins*, this obligation to return money unlawfully taken cannot be impaired by any state law defenses:

As the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. . . . To say that the county could collect these unlawful taxes by coercive means, and not incur any obligation to pay them back, is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course, this would be in contravention of the four-

teenth Amendment, which binds the county as an agency of the State. [253 U.S. at 24.]

And, *General Oil v. Crain*, in rejecting the state sovereign immunity claim made there, laid the foundation for the later cases by recognizing the critical role of state court actions against the State in the vindication of federal rights where the Eleventh Amendment precludes a federal court action. In this regard *General Oil* emphasized that:

Necessarily, to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers. . . . If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution, and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the 14th Amendment, which is directed at state action, could be nullified as to much of its operation. [209 U.S. at 226.]

To be sure, the line of cases culminating in *Reich v. Collins* does not deal directly with the effect of state sovereign immunity rules across the full range of federal causes of action against the State in which the plaintiffs seek financial redress for losses occasioned by state action “in violation of the laws or Constitution of the United States.” But it is difficult, if not impossible, to cabin the *Reich v. Collins* due process principle to the unlawful state tax exactions at issue in that case and its predecessors.

State action taking a person's money or other property in violation of governing federal constraints and denying that person all state court redress for that loss is, most assuredly, a plain affront to due process and to the underlying due process values of fairness and justice in

the administration of the legal regime. But such state action is *not* qualitatively different from state action unlawfully withholding money or other property due to a person under the governing federal law, and then denying that person all state court redress for that loss. Unlawfully taking property that a person rightfully has in hand and unlawfully withholding property from a person who has a legal right to it may not be identical legal wrongs, but the two could not be more closely allied. And, in both instances where a State violates federal law and its courts then deny the federal right-holder redress on state law grounds, the actions of the State both frustrate the enforcement of the paramount federal law and do so in a manner that denies the federal right holder the most basic element of the legal process that is his due.

Thus, *Reich v. Collins* suggests that the Maine courts' refusal to hear and decide federal law causes of action against the State, like the FLSA cause of action here, raises serious Fourteenth Amendment concerns. And that, of course, provides added support for our principal position that by reason of the Supremacy Clause the Maine courts had an obligation to hear and decide the FLSA cause of action brought here and to do so according to the applicable federal law.

II. A State Court May Not Refuse To Entertain A Federal Statutory Private Party Cause Of Action Against A State On The Basis Of State Sovereign Immunity Where The State Court Entertains Analogous State Statutory Causes Of Action Against The State.

In part I of our argument we considered the Article I/ state sovereign immunity issue presented by this case without plumbing the significance of the fact that the Maine courts are open to state-law private party causes of action against the State analogous to the federal law FLSA private party cause of action brought here. Since Maine law does provide for analogous causes of action against the State, none of which is barred by state sovereign

immunity and all of which are routinely heard and decided by the Maine courts, the non-discrimination principle crystallized in *Testa v. Katt*, 330 U.S. 386 (1947), in its own terms requires the Maine courts to hear and decide this FLSA cause of action.

In Justice O'Connor's succinct formulation, "it is settled that a State may not exercise its judicial power in a manner that discriminates between analogous federal and state causes of action. See *Testa v. Katt*, 330 U.S. 386 (1947)." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 776 n.1 (1982) (O'Connor, J., concurring in part and dissenting in part). And *Howlett v. Rose* provides the underlying base for this rule by tracing the Court's path from *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1 (1912), to *McKnett v. St. Louis & S.F. Railway Co.*, 292 U.S. 230 (1934), to *Testa v. Katt* itself. As to *Mondou* and *McKnett*, the Court noted:

In *Mondou*, for example, we held that rights under the Federal Employers' Liability Act (FELA) "may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion." 223 U.S., at 59. . . . [We] found from the fact that the state court was a court of general jurisdiction with cognizance over wrongful-death actions that the court's jurisdiction was "appropriate to the occasion," *id.*, at 57. "The existence of the jurisdiction creat[ed] an implication of duty to exercise it," *id.*, at 58, which could not be overcome by disagreement with the policy of the federal Act, *id.*, at 57.

In *McKnett*, the state court refused to exercise jurisdiction over a FELA cause of action against a foreign corporation for an injury suffered in another State. . . . Because the state court had "general jurisdiction of the class of actions to which that here brought belongs, in cases between litigants situated like those in the case at bar," *id.*, [292 U.S.], at 232, the refusal to hear the FELA action constituted dis-

crimination against rights arising under federal laws, *Id.*, at 234, in violation of the Supremacy Clause. [Howlett, 496 U.S. at 373.]

Howlett then states that the foregoing "principles" were "unanimously reaffirmed" in *Testa v. Katt*, where the Court

held that the Rhode Island courts could not decline jurisdiction over treble damages claims under the federal Emergency Price Control Act when their jurisdiction was otherwise "adequate and appropriate under established local law." 330 U.S. at 394. . . . We observed that the Rhode Island court enforced the "same type of claim" arising under state law and claims for double damages under federal law. 330 U.S. at 394. We therefore concluded that the court had "jurisdiction adequate and appropriate under established local law to adjudicate this action." *Ibid.* The court could not decline to exercise this jurisdiction to enforce federal law by labeling it "penal." The policy of the federal Act was to be considered "the prevailing policy in every state" which the state court could not refuse to enforce "because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers." *Id.*, at 393 (quoting *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S., at 222). [Howlett, 496 U.S. at 373-74.]

There can be no doubt that the Maine Superior Court had "'general jurisdiction of the class of actions to which that here belongs in cases between litigants situated like those in the case at bar' . . . and that the refusal to hear the [federal law] action [here] constituted discrimination against rights arising under federal laws . . . in violation of the Supremacy Clause."

The Maine Superior Courts, such as the Superior Court for Cumberland County where this action was brought, are courts of general jurisdiction. 4 M.R.S. § 105. As such, those courts have broad jurisdiction over a wide

range of state law actions brought by private parties—both state employees and others—against the State seeking monetary remedies. And, as the Maine courts have recognized, there is no Maine common law or Maine constitutional law state sovereign immunity bar to those state law causes of action. *Davis v. City of Bath*, 364 A.2d 1269 (1976).

Under the Maine Tort Claims Act, 14 M.R.S. § 8101 *et seq.*, for example, the Superior Courts have jurisdiction to hear and decide claims against the State for "property damage, bodily injury or death," 14 M.R.S. § 8104-A (defining claims within Act); § 8106 (setting forth jurisdiction of Superior Courts). The Superior Courts have jurisdiction to hear and decide claims against the State for "taking of . . . property in the constitutional sense," *Foss v. Maine Turnpike Auth.*, 309 A.2d 339, 344 (1973), and the related class of claims against the State for "legally unauthorized physical invasion of property or of serious impairment of property use and enjoyment," *id.* at 342. In condemnation actions involving the State Department of Transportation, the Superior Courts have jurisdiction to hear, and do hear, appeals by parties aggrieved by an award by the State Claims Commission. 23 M.R.S. § 157 ("This appeal is de novo and is taken by filing a complaint setting forth substantially the facts upon which the case will be tried like other civil cases.").

Of the most particularized significance, the Maine Superior Courts have jurisdiction to hear, and do hear, a wide variety of state employee state law wage actions against the State. These include:

- actions for late payment of wages; 26 M.R.S. § 621(2), see also, 26 M.R.S. § 626-A (providing for award of triple damages and attorneys fees to prevailing employee-plaintiff);
- actions for failure to pay the Maine statutory minimum wage, 26 M.R.S. §§ 664, 670 (providing for

award of double damages and attorneys fees to prevailing employee-plaintiff);

- actions for violations of the Maine Whistle Blower law, 26 M.R.S. §§ 833, 834-A (providing for recovery of monetary penalties); actions for violations of the Maine Family Medical Leave Act, 26 M.R.S. § 844, and § 848 (providing for liquidated damages of up to \$100.00 per day);
- actions for violations of the Maine Human Rights Act, 5 M.R.S. §§ 4551, 4613, 4614 (providing for back wages, penalties and attorneys fees); and
- actions for violations of the Maine Workers Compensation Act anti-retaliation protections, 39-A M.R.S. §§ 307, 353.¹²

By closing the Maine courts to the federal law employee wage actions brought here, the Maine Supreme Judicial Court's decision dishonors the anti-federal-claim-discrimination principle descending from *Mondou* and restated in *Howlett*. The foregoing summary of the Maine law makes it plain that the Maine courts do hear and decide state law private party actions for monetary remedies which are "analogous" to (*F.E.R.C.*, 456 U.S. at 776 n.1), or of the "same type" as (*Testa*, 330 U.S. at 394), the federal law FLSA claims brought here.

The Maine courts in particular hear and decide state employee wage claims brought under a panoply of employee protective legislation, which like the FLSA, provide for back wages, and sometimes for liquidated damages and attorneys fees. Whether characterized in terms of the damages sought—wages, liquidated damages, at-

¹² This listing is not exhaustive. Under the Maine Workers Compensation Act, for example, state employees may sue the state if the State fails to make timely payment of compensation. The Superior Courts also entertain actions against the State brought by employees under the Maine Unemployment Compensation Act, 26 M.R.S. §§ 1043(11)(A-1), 1194(8), and the Maine State Employee Labor Relations Act, 26 M.R.S. §§ 979-A, 979-M.

torneys fees—or the identity of the parties—state employees and the State—the Maine courts hear and decide private party state law causes of actions for monetary remedies that are in the same "class of actions" as the FLSA actions the Maine courts refuse to hear and decide. And these state law causes of action routinely heard in the Superior Courts, are "analogous" to the FLSA action here on the strictest interpretation of the "analogy" test of *Howlett*, *F.E.R.C.* and *Testa*.

CONCLUSION

For the foregoing reasons the decision and judgment of the Maine Supreme Judicial Court should be reversed.

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No. 98-436

In the Supreme Court of the United States

OCTOBER TERM, 1998

JOHN H. ALDEN, ET AL., PETITIONERS

v.

STATE OF MAINE

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MAINE

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Supremacy Clause of the United States Constitution requires a state court to entertain a claim brought by a state employee against a state employer under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, notwithstanding a state-law defense of sovereign immunity.

2. Whether the Supremacy Clause requires a state court to entertain such a claim when it entertains analogous state-law claims.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court (Pet. App. 1a-13a) is reported at 715 A.2d 172. The opinion of the Maine Superior Court (Pet. App. 14a-24a) is unreported.

JURISDICTION

The judgment of the Maine Supreme Judicial Court was entered on August 4, 1998. The petition for a writ of certiorari was filed on September 14, 1998, and was granted on November 7, 1998. 119 S. Ct. 443. The jurisdiction of this Court rests on 28 U.S.C. 1257(a). On December 14, 1998, the Court granted the motion of the United States to intervene in the case pursuant to 28 U.S.C. 2403.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3 (the Commerce Clause), Article VI, Clause 2 (the Supremacy Clause), and the Eleventh Amendment of the United States Constitution are reproduced in the appendix to the brief. App., *infra*, 1a. Sections 3(x), 7(a)(1), 16 and 17 of the Fair Labor Standards Act are also reproduced in relevant part in the appendix to this brief. App., *infra*, 2a-5a.

STATEMENT

1. a. The Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, requires employers covered by the Act to pay their employees a minimum wage and to compensate overtime work at one and one-half times the regular rate of pay. 29 U.S.C. 206, 207 (1994 & Supp. II 1996). As originally enacted, the FLSA did not apply to state or federal employees. In 1966, Congress extended FLSA coverage to employees of state-owned hospitals, schools, nursing homes, and mental institutions. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102, 80 Stat. 831. In *Maryland v. Wirtz*, 392 U.S. 183 (1968), the Court upheld that extension as a valid exercise of Congress's power to regulate interstate commerce. See U.S. Const., Art. I, § 8, Cl. 3.

In 1974, Congress extended FLSA coverage to most state and federal employees. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55; see 29 U.S.C. 203(d) and (x). In order to accommodate the special concerns of state and local governments, Congress exempted from overtime requirements certain categories of state and local government employees, such as elected officials, their personal staff, and certain of their appointees and advisers. See 29 U.S.C.

203(e)(2)(C). Congress also created special overtime rules for law-enforcement personnel: such employees need not be paid premium overtime compensation until they have worked 171 hours over a period of 28 days. 29 U.S.C. 207(k); 29 C.F.R. 553.230.

In *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), the Court held that the FLSA's minimum-wage and overtime provisions could not constitutionally be applied to state employees engaged in traditional governmental activities. In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Court overruled *National League of Cities* and held that the FLSA's minimum-wage and overtime protections for state employees do not contravene any affirmative limit on Congress's power under the Commerce Clause. Following *Garcia*, Congress amended the FLSA to address specific concerns of state and local governments. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, §§ 2-7, 99 Stat. 787-790. In particular, Congress deferred the effective date of certain provisions of the FLSA; it added new provisions relating to compensatory time in lieu of overtime, special details, and volunteers; and it exempted employees of the legislative branches of States, as well as the States' political subdivisions. *Ibid.*

b. The FLSA provides that "[a]ny employer who violates the provisions of section 206 or section 207 of [Title 29] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. 216(b). The FLSA then establishes three distinct causes of action against employers who have committed violations of the Act and incurred the resulting liability. An employee may sue for unpaid

minimum wages or overtime compensation and an equal amount of liquidated damages (29 U.S.C. 216(b)); the Secretary of Labor may sue on behalf of employees for unpaid minimum wages or overtime compensation and an equal amount of liquidated damages (29 U.S.C. 216(c)); and the Secretary of Labor may sue for injunctive relief, including an injunction against the withholding of previously unpaid minimum wages or overtime compensation (29 U.S.C. 217).

At the time that the FLSA was first extended to state employees, the private right of action in Section 216(b) provided:

Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction.

52 Stat. 1069. In *Employees of the Department of Public Health & Welfare of Missouri v. Department of Public Health & Welfare of Missouri*, 411 U.S. 279 (1973) (*Missouri Employees*), the Court held that, because Section 216(b) did not specifically refer to an action against a *state* employer, Section 216(b) would not, in light of the principles embodied in the Eleventh Amendment, be construed to authorize a private right of action against a state employer in federal court. *Id.* at 284-286. The Court noted that Section 216(b) arguably authorized a private action against a state employer in state court, but it did not resolve that question. *Id.* at 287. See also *id.* at 287-298 (Marshall, J., concurring in the result) (concluding that the then-

applicable version of Section 216(b) overcame a State's common-law immunity to suit and provided for suits against a State in state court, but did not overcome the constitutional limitations on federal judicial power embodied in the Eleventh Amendment).

In response to *Missouri Employees*, Congress amended Section 216(b) to make clear that a private suit can be brought against a state employer. S. Rep. No. 690, 93d Cong., 2d Sess. 26-27 (1974); H.R. Rep. No. 913, 93d Cong., 2d Sess. 41 (1974). As amended, Section 216(b) provides that an action for unpaid wages or overtime compensation and liquidated damages "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees." 29 U.S.C. 216(b). The Act defines a "public agency" to include "the government of a State" or "any agency of * * * a State." 29 U.S.C. 203(x).¹

c. Like the FLSA, Maine law generally requires employers to pay their employees a minimum wage and one and one-half times the regular rate for overtime work. See Me. Rev. Stat. Ann. tit. 26, § 664 (West 1998). State employees are generally covered by the state minimum wage laws, see *id.* § 663(10), and may bring suit in state court to recover unpaid wages, an equal amount of liquidated damages, and attorney's fees, *id.* § 670. As a matter of state substantive law,

¹ The amendment to Section 216(b) also makes clear that federal employees may bring an FLSA action against the Federal government. 29 U.S.C. 203(x) (defining "public agency" to include "the Government of the United States" or "any agency of the United States"); see also 29 U.S.C. 204(f) (allocating authority to the Office of Personnel Management to enforce the Act with respect to federal employees, but reserving the right of employees to bring an action for backpay and liquidated damages).

however, the State has exempted itself from the state-law requirement of paying one and one-half times the regular rate for overtime work. See *id.* § 664(3)(D).

2. a. Petitioners are state probation officers and juvenile case workers who are employed by the State of Maine. Pet. App. 14a. They filed suit in the United States District Court for the District of Maine against the State, alleging that the State had failed to pay them overtime compensation as required by the FLSA. *Ibid.* Petitioners sought backpay and liquidated damages. *Ibid.* The State asserted that petitioners are professionals and therefore exempt from the overtime provisions of the Act. The district court ruled in petitioners' favor on the substantive statutory issue, holding that petitioners are covered by the Act and that they were entitled to overtime compensation in accordance with the special rules that apply to law-enforcement personnel. *Mills v. Maine*, 839 F. Supp. 3 (D. Me. 1993). Following the district court's ruling, the State began to pay petitioners for overtime work. Pet. App. 15a. The parties disagreed, however, on the amount of backpay owed to petitioners. The district court referred that issue to a special master. *Id.* at 14a.

Before the issue of backpay was resolved, this Court decided *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Pet. App. 15a. In *Seminole Tribe*, the Court held that the Eleventh Amendment generally prevents a federal district court from exercising jurisdiction under Article III over a private suit against an unconsenting State, and that Congress lacks power under the Commerce Clause to circumvent that limitation on federal judicial power. 517 U.S. at 72-73. In light of that ruling, the federal district court dismissed petitioners' action for lack of subject-matter jurisdiction, and the Court of

Appeals for the First Circuit affirmed. *Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997).

b. After the dismissal of their federal court action, petitioners filed suit against the State in Maine Superior Court. Pet. App. 14a. As in their federal court suit, petitioners alleged that the State had violated the FLSA's overtime requirements, and they sought backpay and liquidated damages. *Ibid.* The State asserted sovereign immunity as an affirmative defense. *Id.* at 15a. Accepting that defense, the Superior Court entered judgment in favor of the State. *Id.* at 14a-24a. The Superior Court held that "in Maine the doctrine of state sovereign immunity has incorporated the principles of Eleventh Amendment immunity," so that "if a plaintiff can't seek damages against the state for violations of a federal law in federal court, the plaintiff can't seek damages in state court either." *Id.* at 20a.

c. The Maine Supreme Judicial Court affirmed. Pet. App. 1a-13a. The court held that "[i]f Congress cannot force the states to defend in federal court against claims by private individuals, it similarly cannot force the states to defend in their own courts against these same claims." *Id.* at 4a. The court reasoned that "the Eleventh Amendment and state sovereign immunity are analogous, to the extent that both protect the State from being forced by an act of Congress to defend against a federal cause of action brought by a private individual." *Ibid.* To hold that a State that is immune from suit in federal court must defend against that same suit in its own courts, the court concluded, "would effectively vitiate the Eleventh Amendment." *Ibid.*

The court acknowledged that the "Eleventh Amendment does not explicitly protect the states from suit in their own courts." Pet. App. 5a. Relying on *Seminole Tribe*, however, the court concluded that the Eleventh

Amendment “reflects but one aspect of the states’ inherent, more sweeping immunity from suits brought by private parties.” *Id.* at 6a.

Two justices dissented. Pet. App. 7a-14a. They concluded that the Supremacy Clause (which the majority did not address) makes the FLSA fully enforceable in state court, even though petitioners could not bring a similar suit in federal court by virtue of the Eleventh Amendment’s limitation on the federal judicial power. The dissent reasoned that “the Supremacy Clause makes that statute the law in every State, fully enforceable in state court,” *id.* at 10a (quoting *Hilton v. South Carolina Pub. Rys. Comm’n*, 502 U.S. 197, 207 (1991)), and that “[t]o the extent that Maine’s common law doctrine of sovereign immunity conflicts with the provisions of the FLSA which subject the State to liability in state court, the Supremacy Clause resolves that conflict in favor of the FLSA,” *id.* at 12a. The dissent also concluded that the majority erred in relying on *Seminole Tribe*, because “state courts are not Article III courts, and the ‘Eleventh Amendment does not apply in state courts.’” *Id.* at 8a-9a.

SUMMARY OF ARGUMENT

A. In the Fair Labor Standards Act (FLSA), Congress has provided that state employees who do not receive the wages to which they are entitled under the Act have a right to seek make-whole relief in a state court of competent jurisdiction. In this case, it is clear that petitioners filed their action in such a court, the Superior Court of Maine, which is a court of general jurisdiction that adjudicates a broad range of cases, including monetary claims against the State. The question presented is whether the state court may nonetheless refuse to entertain petitioners’ cause of

action under the FLSA by relying on the sovereign immunity defense asserted by the State.

B. The answer is supplied by the Supremacy Clause of the Constitution, Art. VI, Cl. 2, which makes federal law the “supreme Law of the Land,” and directs that “the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” By its terms, the Supremacy Clause makes a federal law as much the law in the States as laws passed by the state legislature, and it charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. That rule applies equally to actions against a State. When “a federal statute does impose liability upon the States, the Supremacy Clause makes that statute the law in every state, fully enforceable in state court.” *Hilton v. South Carolina Pub. Rys. Comm’n*, 502 U.S. 197, 207 (1991). The Superior Court was therefore required by the terms of the Supremacy Clause to enforce petitioners’ FLSA claim, notwithstanding any defense that state law might afford to a claim brought under state law.

A state court’s duty to enforce federal law is subject to a narrow exception—a state court may refuse enforcement when it has a “valid excuse.” *Howlett v. Rose*, 496 U.S. 356, 369 (1990). An excuse is not valid, however, if it discriminates against federal law or if it directly conflicts with federal law. Maine’s sovereign immunity defense does both. It discriminates against federal law because Maine courts entertain monetary claims against the State under state law, including wage claims by state employees. And more fundamentally, the sovereign immunity defense conflicts with federal law, because, in amending the FLSA in 1974, Congress clearly intended to impose liability on the

States for unpaid wages and to confer on state employees a personal right to recover the amounts they are owed.

C. There is no federal constitutional principle of state sovereign immunity that overrides a state court's general duty under the Supremacy Clause to enforce federal law. The Eleventh Amendment, by its terms, creates a limitation only on "[t]he Judicial power of the United States," and this Court has repeatedly stated that the Eleventh Amendment does not apply to suits brought in state court.

Nor does the Constitution otherwise confer or codify a rule of state sovereign immunity that restricts the power of Congress to create a federal cause of action enforceable against a State in state court. The common-law principle that a State cannot be sued in its own courts without its consent is based "on the logical and practical ground that there can be no legal right as against the authority that makes the law upon which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907). Once the States agreed to give Congress power under Article I of the Constitution to make the law on which a right depends, and agreed that such a law would be the "supreme Law of the Land"—binding on "the Judges in every State, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"—they effectively empowered Congress (in the case of federal claims) to remove or temper the "logical and practical ground" on which the doctrine of a sovereign's immunity in its own courts depended.

This Court's decisions firmly support that conclusion. The holding in *Nevada v. Hall*, 440 U.S. 410 (1979), that the Constitution does not protect one State from being sued in another State's courts, makes clear that the

Constitution does not address the question whether a State can be sued in a forum other than federal court. The holding in *Hilton*, that States are subject to private suit in state court under the Federal Employers' Liability Act, necessarily rejects the view that States enjoy the same constitutional immunity from suit in their own courts that they enjoy in federal court. And the same is true of *Reich v. Collins*, 513 U.S. 106 (1994), which holds that a State that has collected taxes through compulsion in violation of the Constitution must provide a state-court refund remedy, even though the State would not be subject to suit in federal court.

Seminole Tribe v. Florida, 517 U.S. 44 (1996), does not lead to a contrary conclusion. The holding and rationale of that case are that the Eleventh Amendment restricts the judicial power of the federal courts under Article III, and that Article I cannot be used to circumvent that limitation. That decision does not supply a basis for concluding that there is a free-floating constitutional principle of sovereign immunity that is wholly unanchored in the Eleventh Amendment's text and its exclusive focus on "[t]he Judicial power of the United States."

D. Private enforcement of FLSA claims in state court that cannot be brought in federal court protects the personal rights of employees and respects state sovereignty. Congress determined that a private remedy was necessary to ensure that state employees receive the wages to which they are entitled by federal law. Because the Secretary of Labor's resources are limited, an action by the Secretary is not an adequate substitute for the private right of action that Congress deemed necessary. A private right of action in state court also does not raise the same federalism concerns that such an action in federal court raises. For a State,

a state court is not "the instrument of a distant, disconnected sovereign," *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 41 (1994), but an integral part of the State itself. The availability of a state court as a forum also furthers a State's interest in playing a role in defining the contours of federal law and in integrating federal and state law into a single body of law governing the conduct of state officials. That interest would be impaired if the only means of enforcement were a suit by the Secretary of Labor, who could be expected to file suit in federal court. In light of the Supremacy Clause and those considerations, any interest the State has in asserting immunity in this case must give way to the overriding interest in the vindication of federal law.

ARGUMENT

MAINE COURTS MAY NOT REFUSE, ON THE BASIS OF A DEFENSE OF SOVEREIGN IMMUNITY, TO ENTERTAIN A SUIT BROUGHT BY STATE EMPLOYEES AGAINST A STATE EMPLOYER UNDER THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, generally requires employers covered by the Act to pay their employees a minimum wage and to compensate overtime work at one and one-half times the regular rate of pay, and it renders "[a]ny employer" that violates those requirements liable for the unpaid minimum wages and overtime compensation. The substantive validity of those provisions as applied to state employees was resolved in *Garcia v. San Antonio*

Metropolitan Transit Authority, 469 U.S. 528 (1985), and is not at issue here.²

The question presented in this case concerns how those provisions may be enforced against state employers. In the wake of *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), federal courts of appeals have concluded that the Eleventh Amendment forecloses a private action against a State in federal court, but that such an action may be maintained in state court. *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (1996), amended by 107 F.3d 358 (6th Cir. 1997); *Aaron v. Kansas*, 115 F.3d 812, 817 (10th Cir. 1997); see also *Rehberg v. Department of Pub. Safety*, 946 F. Supp. 741, 743 (S.D. Iowa 1996), *aff'd*, 117 F.3d 1423 (8th Cir. 1997) (Table); *Velasquez v. Frapwell*, 160 F.3d 389, 394 (7th Cir. 1998) (Posner, C.J.) (reaching similar conclusion under the Uniformed Services Employment and Reemployment Act), petition for reh'g pending, No. 95-1547. A number of state courts have agreed. *Jacoby v. Arkansas Dep't of Educ.*, 962 S.W.2d 773 (Ark. 1998), petition for cert. pending, No. 98-4; *Bunch v. Robinson*, 712 A.2d 585 (Md. Ct. Spec. App.), cert. granted, 718 A.2d 234 (Md. Oct. 7, 1998); *Ahern v. New York*, 676 N.Y.S.2d 232 (App. Div. 1998); *Whittington v. New Mexico Dep't of Pub. Safety*, 996 P.2d 188 (N.M. Ct. App.), cert. denied, No. 25,364 (N.M. Oct. 14, 1998).

In this case, however, the Maine Supreme Judicial Court held that state courts may refuse, based on a defense of sovereign immunity, to entertain a suit brought by state employees under the FLSA. Under that

² The Court recently denied certiorari in a case in which the petitioner and its amici asked the Court to reconsider the decision in *Garcia*. See *Anne Arundel County v. West*, 119 S. Ct. 607 (Dec. 7, 1998).

decision, unless a State consents to suit, the minimum wage and overtime provisions of the Act that this Court upheld in *Garcia* could be enforced against the State only by the Secretary of Labor, who does not have the resources to ensure comprehensive enforcement. The Maine Supreme Judicial Court's decision therefore is of profound concern to the United States.

As we explain below, the holding of the Maine Supreme Judicial Court cannot be sustained. Congress has specifically conferred a right on state employees under the FLSA to sue in state court to recover the amounts owed to them by their state employer in unpaid minimum wages or overtime compensation. The Supremacy Clause requires a state court to entertain a federal cause of action if its ordinary jurisdiction is appropriate to the task; state-law defenses to liability and to suit do not furnish a valid excuse for refusing to do so. There is no sovereign immunity exception to that mandate of the Supremacy Clause. Although the Eleventh Amendment embodies a constitutional restriction on the exercise of the judicial power of the United States by Article III courts to entertain a suit against a State without its consent, the Eleventh Amendment does not apply in state courts. Nor does the Constitution elsewhere confer on the States a defense of sovereign immunity in state court. The availability of a state forum to entertain FLSA claims ensures protection for the personal rights of employees to recover the compensation owed to them under federal law. It also respects state sovereignty by ensuring that suits against the State are resolved by a court "ordained" by the State itself, not "the instrument of a distant, disconnected sovereign," *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 41 (1994), and it furthers the State's interest in integrating federal

sources of law into the state system for the regulation of the conduct of state officials.

A. PETITIONERS HAVE A RIGHT UNDER THE FLSA TO BRING THEIR SUIT IN STATE COURT

Under the FLSA, employees who do not receive the wages to which they are entitled under the Act have a right to seek make-whole relief. That right is conferred by 29 U.S.C. 216(b), which provides in relevant part:

Any employer who violates the [minimum wage or overtime] provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. * * * An action to recover the liability prescribed * * * may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

The text of Section 216(b) makes three points clear. First, Congress provided that "[a]ny employer" who violates Section 206 or 207 "shall be liable" to the employees affected in the amount of their unpaid minimum wages or overtime compensation, and that state employees shall have the same right to make-whole relief as other employees covered by the Act. Thus, Section 216(b) specifically provides that an action may be brought against "any employer (including a public agency)" to recover "the liability prescribed," and the Act defines a "public agency" to include "the government of a State" as well as "any agency of * * * a

State.” 29 U.S.C. 203(x). Second, Congress did not limit employees to asserting their claims in federal court; Section 216(b) expressly provides that an action for backpay and liquidated damages may be maintained “in any * * * State court of competent jurisdiction” as well. Third, by authorizing FLSA suits to be brought in a state court of “competent jurisdiction,” Congress made clear that a state court is required to hear an FLSA claim when “its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion.” *Second Employers’ Liability Cases*, 223 U.S. 1, 56-57 (1912) (interpreting similar language in the Federal Employers’ Liability Act).

Petitioners in this case filed an FLSA action in the Superior Court of Maine, alleging that the State had failed to pay them overtime compensation as required by the Act, and seeking backpay and liquidated damages as provided for by Section 216(b). It is undisputed that the “ordinary jurisdiction” of the Superior Court of Maine is “appropriate” for entertaining petitioners’ FLSA claim. *Second Employers’ Liability Cases*, 223 U.S. at 57. The Superior Court is a court of general subject matter jurisdiction, and it is authorized to provide both legal and equitable relief. Me. Rev. Stat. Ann. tit. 4, § 105 (West 1998). Consistent with that general authority, the Superior Court has jurisdiction over actions for backpay and liquidated damages under the State’s own minimum-wage and overtime laws against employers generally. *Id.* tit. 26, § 670. It also has jurisdiction over other actions brought against the State in “a variety of its capacities,” *Howlett v. Rose*, 496 U.S. 356, 379 (1990), including in its capacity as employer. And in particular, the Superior Court is authorized to hear claims by state employees alleging that the State has failed to pay the minimum wage

required by state law. Me. Rev. Stat. Ann. tit. 26, §§ 664, 670 (West 1998) (minimum wage); see also *id.* § 833 (whistle blower); *id.* § 844 (family medical leave); *id.* tit. 5, §§ 4551 *et seq.* (human rights); *id.* tit. 39-A, § 101 (workers’ compensation). The Superior Court is therefore fully “competent” to hear petitioners’ FLSA claims within the meaning of Section 216(b).³ That court is not free to refuse to entertain those FLSA claims based on a defense of sovereign immunity.

B. UNDER THE SUPREMACY CLAUSE, THE SUPERIOR COURT OF MAINE IS REQUIRED TO ENTERTAIN PETITIONERS’ FLSA CLAIMS

1. When Congress provides for a federal claim to be heard in state court, the extent of a state court’s duty to enforce that claim is governed by the Supremacy Clause of the Constitution, Art. VI, Cl. 2. The Supremacy Clause makes federal law the “supreme Law of the Land,” and it directs that “the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” By its terms, the Supremacy Clause makes federal laws “as much laws in the States as laws passed by the state legislature” and “charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.” *Howlett*, 496 U.S. at 367. “The existence of the jurisdiction [in the state court] creates an implication of a duty to exercise it.” *Id.* at 369-370. That is so, under the terms of

³ As a result, “[t]his case does not present the questions whether Congress can require the States to create a forum with the capacity to enforce federal statutory rights or to authorize service of process on parties who would not otherwise be subject to the court’s jurisdiction.” *Howlett*, 496 U.S. at 378.

the Supremacy Clause, notwithstanding “any Thing in the Constitution or Laws of any State to the Contrary”—including any defense to liability or suit that state law might afford to a state-law cause of action.

Consistent with that understanding, the first Congress “conferred jurisdiction upon the state courts to enforce important federal civil laws, and succeeding Congresses conferred on the states jurisdiction over federal crimes and actions for penalties and forfeitures.” *Testa v. Katt*, 330 U.S. 386, 389-390 (1947); see also *Printz v. United States*, 521 U.S. 898, 905-907 (1997). Those early laws establish that, from the beginning, the Supremacy Clause was “understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.” *Printz*, 521 U.S. at 907. “It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time. The principle underlying so-called ‘transitory’ causes of action was that laws which operated elsewhere created obligations in justice that courts of the forum state would enforce.” *Ibid.*

There was a period between 1800 and 1876 in which “this Court and state courts broadly questioned the power and duty of state courts to exercise their jurisdiction to enforce United States civil and penal statutes or the power of the Federal Government to require them to do so.” *Testa*, 330 U.S. at 390. In *Clafin v. Houseman*, 93 U.S. 130 (1876), however, this Court returned to the original understanding of the Supremacy Clause, explaining that, by virtue of that Clause, “[t]he laws of the United States are laws in the several

States, and just as much binding on the citizens and courts thereof as the State laws are.” *Id.* at 136. That has been the understanding ever since. As the Court explained in the *Second Employers’ Liability Cases*, 223 U.S. at 57:

The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.

See also *Testa*, 330 U.S. at 393, 394 (“the policy of the federal Act is the prevailing policy in every state,” and state courts “with jurisdiction adequate and appropriate under established local law” are “not free to refuse enforcement” of the federal law); *Howlett*, 496 U.S. at 367 (quoted at p. 17, *supra*); *id.* at 371-372; *Printz*, 521 U.S. at 928-929 (“*Testa* stands for the proposition that state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause (‘the Judges in every State shall be bound [by federal law]’).”); accord *New York v. United States*, 505 U.S. 144, 178-179 (1992); *FERC v. Mississippi*, 456 U.S. 742, 760-761, 769 (1982); *id.* at 776 n.1, 784-785 (O’Connor, J., concurring in the judgment and dissenting in part); *Palmore v. United States*, 411 U.S. 389, 402 (1973); *Tafflin v. Levitt*, 493 U.S. 455, 469-470 (1990) (Scalia, J., concurring).

This rule applies equally to laws authorizing suits against the States. As the Court unequivocally stated in *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 207 (1991), when “a federal statute does impose liability upon the States, the Supremacy Clause makes that statute the law in every State, fully enforceable in state court.”

2. The principle that state courts have a duty under the Supremacy Clause to enforce federal law is generally subject to a narrow exception: a state court may refuse enforcement of a federal claim when it has a “valid excuse.” *Howlett*, 496 U.S. at 369 (quoting *Douglas v. New York, N.H. & H. R.R.*, 279 U.S. 377, 387-388 (1929)). That exception, however, applies only where the court is not one of general (or otherwise appropriate) jurisdiction, see *Howlett*, 496 U.S. at 372 (“The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented.”), or federal law gives the state court discretion to decline to exercise its jurisdiction, see *id.* at 374-375 & n.19; *Douglas*, 279 U.S. at 387-388; *Second Employers’ Liability Cases*, 223 U.S. at 57.

Maine has advanced no such “valid excuse” here. A state court may not evade its duty under the Supremacy Clause by recognizing a state-law defense of sovereign immunity where that defense would be inconsistent with a federal statute that subjects the State to liability and suit. And more particularly here, it may not do so where, as in this case, the state court is authorized to adjudicate monetary claims against the State under state law. We shall discuss first the latter

(and more particular) ground for rejecting the State’s defense of immunity in this case.

a. An excuse for declining to entertain a federal cause of action is not “valid” under this Court’s Supremacy Clause jurisprudence if it “discriminate[s] against rights arising under federal laws.” *McKnett v. St. Louis & San Francisco Ry.*, 292 U.S. 230, 233 (1934). For example, in *Testa*, Rhode Island refused to entertain actions under the Emergency Price Control Act, 50 U.S.C. App. 901 *et seq.*, because it viewed the Act’s provision for treble damages as “penal” in nature. 330 U.S. at 387-388. The State, however, “conceded that this same type of claim arising under Rhode Island law would be enforced by that State’s courts[,]” and “[i]ts courts ha[d] enforced claims for double damages growing out of the Fair Labor Standards Act.” *Id.* at 394. The Court held that, “[u]nder these circumstances the State courts [were] not free to refuse enforcement” of a claim under the Emergency Price Control Act. *Ibid.*

Similarly, in *Howlett*, a Florida state court had refused to entertain an action under 42 U.S.C. 1983 against a local school board on the ground that such actions were barred by sovereign immunity under state law. 496 U.S. at 364. The State, however, exercised jurisdiction over state tort claims of the same general “type,” *id.* at 378, such as actions against state entities for failure of their officials adequately to police a parking lot and for the negligence of such officers in arresting a person on the roadside, *id.* at 380. This Court held that, in those circumstances, the State’s refusal to take cognizance of the federal cause of action “flatly violates the Supremacy Clause.” *Id.* at 380-381.

b. More generally and fundamentally, the Supremacy Clause is violated if a state court refuses to

enforce a federal law when federal law requires it to do so. Even if the State's refusal to entertain a federal claim is based on a state defense or other rule that applies equally to both federal and state claims of the same type, that refusal is not valid when the rule "is inconsistent with or violates federal law." *Howlett*, 496 U.S. at 371. For example, in *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359 (1952), Ohio law made negligence a question for the jury, but reserved for the judge the question of fraud in the release of rights. The Court first held that federal law, not state law, governed the question of the validity of a release of rights under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, for "[m]anifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act." 342 U.S. at 361. The Court then considered the validity, as applied to a suit under the FELA, of the general division of fact-finding responsibility under state law, which permitted judges rather than juries to decide the issue of fraud in a release. *Id.* at 362-363. Notwithstanding the neutrality of that rule, the Court held that it could not be applied in actions under the FELA. The Court reasoned that the Supremacy Clause required the Ohio courts to permit juries to decide the issue of fraud in FELA cases because the right to a jury trial is "part and parcel of the remedy afforded railroad workers under the Employers Liability Act." *Id.* at 363.

Similarly, in *Felder v. Casey*, 487 U.S. 131 (1988), Wisconsin law provided that no action could be brought against a local government or official unless the claimant provided a notice of claim within 120 days of

the alleged injury, and that rule applied equally to state and federal causes of action against local governments. *Id.* at 144. This Court held that Wisconsin could not apply its notice-of-claim rule to actions brought in state court under Section 1983. The Court reasoned that the notice-of-claim rule impermissibly burdened the right guaranteed by Section 1983 to recover for deprivations of civil rights and was therefore preempted by the Supremacy Clause. *Id.* at 153⁴; see also *General Oil Co. v. Crain*, 209 U.S. 211, 226 (1908) (State may not apply generally-applicable rule of sovereign immunity to preclude an action against a state official for prospective

⁴ The Court explained:

Wisconsin's notice-of-claim statute undermines this "uniquely federal remedy" in several important respects. First, it conditions the right of recovery that Congress has authorized, and does so for a reason manifestly inconsistent with the purposes of the federal statute: to minimize governmental liability. Nor is this condition a neutral and uniformly applicable rule of procedure; rather, it is a substantive burden imposed only upon those who seek redress for injuries resulting from the use or misuse of governmental authority.

* * * * *

* * * States, however, may no more condition the federal right to recover for violations of civil rights than bar that right altogether, particularly where those conditions grow out of a waiver of immunity which, however necessary to the assertion of state-created rights against local governments, is entirely irrelevant insofar as assertion of the federal right is concerned, see *Martinez [v. California]*, 444 U.S. 277, 284 [(1980)], and where the purpose and effect of those conditions, when applied in § 1983 actions, is to control the expense associated with the very litigation Congress has authorized.

487 U.S. at 141, 144 (citation omitted).

relief to prevent a constitutional violation, since that would leave "an easy way * * * open to prevent the enforcement of many provisions of the Constitution").

3. Under this Court's decisions, therefore, Maine's assertion in state court of a defense of sovereign immunity was not a valid basis for the state court to refuse to enforce petitioners' FLSA claims against the State. Maine's sovereign immunity defense both discriminates against claims brought under federal law and, more generally and fundamentally, is inconsistent with federal law.

a. Maine law expressly permits monetary claims to be brought against the State in state court. Indeed, Maine courts entertain such claims against the State specifically in its capacity as an employer, including wage claims for violations of the State's minimum-wage law. Me. Rev. Stat. Ann. tit. 26, §§ 664, 670 (West 1998) (minimum wage); see also *id.* § 833 (whistle blower); *id.* § 844 (family medical leave); *id.* tit. 5, §§ 4551 *et seq.* (human rights); *id.* tit. 39-A, § 101 (workers' compensation). Especially in these circumstances, the State's assertion of sovereign immunity as a defense to a claim under the FLSA constitutes impermissible discrimination against a federal claim.

The State asserts (Br. in Opp. 21-22) that there is no discrimination because petitioners are seeking one and one-half times their regular rate of pay for overtime work, and Maine courts do not entertain such state-law claims against the State. But the State's failure to entertain state-law overtime claims against the State for one and one-half times the regular rate of pay reflects nothing more than the State's substantive policy judgment that the State should not be required to pay its employees a premium overtime rate in the first place. Me. Rev. Stat. Ann. tit. 26, § 664(3)(D) (West

1998) (exempting public employees from overtime provision). A state court may not decline to enforce the FLSA, however, because it disagrees with the policy judgment made by Congress, which this Court upheld in *Garcia*, regarding the rate of compensation it must pay to its employees. See, e.g., *Testa*, 330 U.S. at 390, 392.

Accordingly, as the decisions in *Testa* and *Howlett* demonstrate, a finding of discrimination against a federal claim, in violation of the Supremacy Clause, does not depend on the existence of a state claim that is identical to the federal claim in every detail. Rather, discrimination exists when the State entertains suits of the same general type. *Howlett*, 496 U.S. at 361, 378, 380 (state court must entertain Section 1983 action alleging that school's search of car and suspension of student from school violated the Constitution where state court entertained state-law tort suits against state entities, including school boards, and against state officers); *Testa*, 330 U.S. at 394 (state court must entertain treble-damage price-control claim where state court would enforce same type of claim under state law and had enforced double-damage FLSA claim); see also *Second Employers' Liability Cases*, 223 U.S. at 57 (action under FELA is sufficiently analogous to state-law claims for personal injury and wrongful death).

When a state court's basis for refusing to entertain a federal monetary claim is a sovereign immunity defense, the relevant question—for the specific purpose of assessing the issue of discrimination—is whether the state court entertains state-law monetary claims against the State in which the State does not recognize sovereign immunity as a defense. At the very least, however, when a State entertains state-law *wage* claims against the State, but refuses to entertain federal-law

wage claims against the State, it discriminates against the federal wage claim. Such discrimination "flatly violates the Supremacy Clause." *Howlett*, 496 U.S. at 380-381.⁵

b. Apart from the issue of discrimination, Maine's sovereign immunity defense also directly conflicts with federal law. The text of Section 216(b) expressly provides that any employer who violates the FLSA's minimum wage or overtime requirements "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. 216(b). It further provides that "[a]n action to recover the liability * * * may be maintained against any employer (including a public agency)." *Ibid.* The Act defines a public agency to include "the government of a State." 29 U.S.C. 203(x). Because the statutory text makes clear that employers who violate the FLSA "shall be liable" to the affected employees for the unpaid wages or overtime compensation, extends such liability to any employer (including "the government of a State"), and authorizes suits in state court against all

⁵ If the issue of discrimination were assessed at the level of detail suggested by the State, the States could far more readily assert an excuse that masked the State's substantive disagreement with federal policy—a per se impermissible basis for refusing to enforce a federal claim. *Second Employers' Liability Cases*, 223 U.S. at 57 ("The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction is quite inadmissible."). When the issue of discrimination is assessed at the appropriate level of generality, it substantially diminishes the danger that the State's excuse reflects mere disagreement with the substantive policy of federal law.

such employers (including the State), the FLSA leaves no room for a state-law defense of sovereign immunity.

Indeed, as previously discussed (see p. 5, *supra*), the whole point of the 1974 amendment to Section 216(b) was to make clear that state employees could file suit against a state employer under Section 216(b) and to override any claim of sovereign immunity that would otherwise stand in the way of such a claim. S. Rep. No. 690, *supra*, at 27-28; H.R. Rep. No. 913, *supra*, at 41. For that reason, the defense of sovereign immunity asserted by the State in this case would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Felder*, 487 U.S. at 138 (quoting *Perez v. Campbell*, 402 U.S. 637, 649 (1971), and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). It therefore conflicts with, and is preempted by, Section 216(b), quite aside from the fact that the defense impermissibly discriminates against the federal FLSA claim. See, e.g., *Howlett*, 496 U.S. at 376-383.

C. THERE IS NO CONSTITUTIONAL PRINCIPLE OF STATE SOVEREIGN IMMUNITY THAT LIMITS THE POWER OF CONGRESS TO PROVIDE FOR A SUIT AGAINST A STATE IN A STATE COURT OF COMPETENT JURISDICTION

The Maine Supreme Judicial Court held that the Eleventh Amendment to the Constitution and the principle of sovereign immunity that it embodies afford a defense to petitioners' FLSA claims in state court, notwithstanding Congress's express provision for such suits. That holding rests on a misunderstanding of both the Eleventh Amendment and the constitutional principle of sovereign immunity reflected in that Amendment.

1. The Eleventh Amendment provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." By its terms, the Eleventh Amendment tracks Article III and creates a limitation only on "[t]he Judicial power of the United States." It does not limit the jurisdiction of state courts, or affect Congress's power to create a cause of action that may be enforced in those courts.

This Court's decisions are consistent with that understanding of the Eleventh Amendment. The Court has repeatedly stated that the Eleventh Amendment does not preclude the assertion of federal claims in state court. See *Hilton*, 502 U.S. at 204-205 ("[A]s we have stated on many occasions, 'the Eleventh Amendment does not apply in state courts.'"); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-64 (1989) (same); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980) ("No Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only '[t]he Judicial power of the United States.'"); *Nevada v. Hall*, 440 U.S. 410, 420-421 (1979).

The Eleventh Amendment's limitation "is, without question, a reflection of concern for the sovereignty of the States, but in a particular limited context." *Employees of Dep't of Pub. Health & Welfare of Missouri v. Department of Pub. Health & Welfare of Missouri*, 411 U.S. 279, 293 (1973) (*Missouri Employees*) (Marshall, J., concurring). "The issue is not the general immunity of the States from private suit * * * but merely the susceptibility of the States to suit before federal tribunals." *Id.* at 293-294. The Eleventh

Amendment restricts the federal judicial power over the States because of the "problems of federalism inherent in making one sovereign appear against its will in the courts of the other." *Ibid*; see also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-240 n.2 (1985) (approving Justice Marshall's concurrence in *Missouri Employees*). The Eleventh Amendment therefore is not implicated when Congress authorizes a suit to be brought against a State in state court.

2. Nor does the Constitution otherwise confer or codify a rule of state sovereign immunity that restricts the power of Congress to create a federal cause of action that is enforceable against a State in state court. Before the Constitution was adopted, there was an established common-law principle that a State could not be sued in its own courts without its consent. *Nevada v. Hall*, 440 U.S. at 414-416. That principle, however, was based on concepts "quite different," *id.* at 414, from those that justified a sovereign's immunity "in the courts of another sovereign," *ibid.*—namely, "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Nevada v. Hall*, 440 U.S. at 415, 416 & n.10 (quoting *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907)). But once the States agreed to give Congress power under Article I of the Constitution to "make the law on which [a] right depends," and agreed that such a law would be the "supreme Law of the Land"—binding on "the Judges of every State, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"—they effectively empowered Congress (in the case of federal claims) to remove or temper the "logical and practical ground" on

which the doctrine of a sovereign's immunity in its own courts depended.

To the extent that a State is the authority that makes the law enforceable in its courts, the State retains a corresponding immunity from suit without its consent. But where Congress enacts a law, that law "is as much the policy of the State as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State." *Howlett*, 496 U.S. at 371 (quoting *Second Employers' Liability Cases*, 223 U.S. at 57). In other words, when, as here, Congress has acted pursuant to one of its enumerated powers and provided for a cause of action against the State enforceable in state court, Congress is, along with the Maine Legislature, "the authority that makes the law on which [petitioners'] right depends." *Nevada v. Hall*, 440 U.S. at 416 (quoting *Kawananakoa*, 205 U.S. at 353). Since the FLSA, which for present purposes is part of the law of the State of Maine,⁶ precludes the assertion of a defense of sovereign immunity, there is no "logical and practical ground" in the substantive law of the State—"the law on which [petitioners'] right depends"—that would preclude a suit against the State in its own courts. *Ibid.*

3. The Court's actual holding in *Nevada v. Hall* also illustrates that the constitutional principle of sovereign immunity is limited to protecting States against private suits in federal court, and that it does not address suits against a State in another forum. There, the Court held that the Constitution does not protect one State from

⁶ "The laws of the United States are laws in the several States," and together with any state law that is not in conflict, they become "the law of the land for the State." *Howlett*, 496 U.S. at 367 (quoting *Claflin v. Houseman*, 93 U.S. at 136-137).

being sued in another State's courts. 440 U.S. at 418-427. The Court noted that "language used by this Court in cases construing" the Eleventh Amendment's limits on federal judicial power, as well as "language used during the debates on ratification of the Constitution," manifested a "widespread acceptance of the view that a sovereign State is never amenable to suit without its consent." *Id.* at 420. The Court explained, however, that "all of these cases, and all of the relevant debate, concerned questions of federal-court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts." *Id.* at 420-421. The cases and the debate therefore "[did] not answer the question whether the Constitution places any limit on the exercise of one State's power to authorize its courts to assert jurisdiction over another State." *Id.* at 421. Since there was no basis in the Constitution for imposing such a limit, the Court refused to imply one. *Id.* at 424-427.

Nevada v. Hall makes clear that the constitutional principle of sovereign immunity does not mean that States can never be subjected to suit without their consent. Instead, the Framers of the Constitution were concerned with a narrower question—whether the States could be subjected to suit in federal court. Just as there is nothing in the Constitution that protects one State from being sued in the courts of another State, so too there is nothing in the Constitution that prevents a State from being sued in its own courts for a violation of federal law when Congress authorizes such an action. Indeed, because Congress has power under Article I to "make the law on which [a] right depends" (*Kawananakoa*, 205 U.S. at 353), because such a law is the "supreme Law of the Land," binding on "the Judges of

every State" (Article VI, Clause 2), and because that law "is as much the policy of [a] State as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State," (*Howlett*, 496 U.S. at 371 (quoting *Second Employers' Liability Cases*, 223 U.S. at 57)), it is inherent in the structure of the Constitution that Congress may provide for such a suit.

4. *Hilton* strongly supports that conclusion. In *Hilton*, the Court held that a private action for damages under the FELA could be enforced against a state employer in state court even though the Court had already made clear in *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468 (1987), that the same suit would be barred by the Eleventh Amendment if brought in federal court. 502 U.S. at 201-203.

The State in that case argued that there were principles of sovereign immunity inherent in the Constitution that required Congress to clearly manifest its intent to subject States to suit in state court, and that the FELA did not contain such a clear statement. No. 90-848 Resp. Br., at 14. The Court rejected that argument on the ground that the clear statement rule is a "rule of constitutional law based on the Eleventh Amendment," and "the Eleventh Amendment does not apply in state courts." 502 U.S. at 204-205. Viewing the question before it as "a pure question of statutory construction," the Court concluded that principles of stare decisis required adhering to the Court's previous holding in *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964), that the FELA subjects state employers to liability. 502 U.S. at 205; see also *ibid.* ("The issue in *Will* [*v. Michigan Dep't of State Police*, *supra*] and in this case is different from

the issue in our Eleventh Amendment cases in a fundamental respect: The latter cases involve the application of a rule of constitutional law, while the former cases apply an ordinary rule of statutory construction. *Will*, *supra*, at 65.").

If, as the Maine Supreme Judicial Court concluded, a State's immunity from suit in its own courts has the same federal constitutional status as a State's immunity from suit in federal court, this Court in *Hilton* would have been required to apply a clear statement rule, rather than treating the question before it as a pure question of statutory interpretation. That is so because the clear statement rule is a component of the Eleventh Amendment, *Dellmuth v. Muth*, 491 U.S. 223, 227-228 (1989), and thus would also have been a component of an equivalent constitutional immunity from suit in state court. By failing to apply the clear statement rule, and treating the question before it as solely one of statutory construction governed by principles of stare decisis, the Court in *Hilton* necessarily rejected the Maine Supreme Judicial Court's premise in this case that States enjoy the same constitutional immunity from suit in their own courts that they enjoy in federal court. Thus, the analysis the Court employed in *Hilton* substantially refutes respondent's argument that the Constitution of the United States confers on the States a defense of immunity in state court, where Congress (as in the FELA and FLSA) has expressly subjected the State to liability and suit. That import of *Hilton* is strongly reinforced by the Court's concluding statement that when "a federal statute does impose liability upon the States, the Supremacy Clause makes that statute the law in every State, fully enforceable in state court." 502 U.S. at 207.

5. *Reich v. Collins*, 513 U.S. 106 (1994), lends additional support for that conclusion. In that case, the Court reaffirmed a long line of cases holding that a State that has collected taxes, through compulsion, in violation of the Constitution must provide a tax refund remedy, "the sovereign immunity States traditionally enjoy in their own courts notwithstanding." *Id.* at 109-110. The Court noted that a state court must furnish such a remedy, even though "the sovereign immunity States enjoy in *federal* court, under the Eleventh Amendment, does generally bar tax refund claims from being brought in that forum." *Id.* at 110.

Reich involved a state court's duty to provide a remedy against the State for a violation of the Constitution. There is no basis, however, for distinguishing that case from one in which Congress, acting pursuant to its powers under the Constitution, has created a cause of action against the State enforceable in state court. The Supremacy Clause makes both the "Constitution" and "the Laws of the United States" the "supreme Law of the Land," and binds state judges equally to each. Thus, whether the claim arises under the Constitution or a law of the United States, the Supremacy Clause requires the state court to entertain the action, "the sovereign immunity States traditionally enjoy in their own courts notwithstanding." *Reich*, 513 U.S. at 110.

6. In holding that the Constitution restricts Congress's power to provide for a private action against a State in state court, the Maine Supreme Judicial Court relied heavily on *Seminole Tribe*. That decision, however, does not justify the Maine Supreme Judicial Court's holding.

In *Seminole Tribe*, the Court reaffirmed that the constitutional principle of sovereign immunity extends

beyond the literal language of the Eleventh Amendment, which restricts only the diversity jurisdiction of the federal courts, and reaches all private federal-court actions for damages against unconsenting States. 517 U.S. at 54. The Court's decision, however, does not support the conclusion that there is a free-floating constitutional principle of sovereign immunity that is wholly unanchored from the Eleventh Amendment's text and its exclusive focus on "[t]he Judicial power of the United States." To the contrary, the Court repeatedly stated that the constitutional principle of sovereign immunity operates as a limitation on federal judicial power. *Ibid.* ("For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'"); *id.* at 64 ("It was well established in 1989 when *Union Gas* was decided that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III."); *id.* at 65 ("[I]t had seemed fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III."); *id.* at 72-73 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). The Maine Supreme Judicial Court's reliance on *Seminole Tribe* as a basis for refusing to entertain petitioners' FLSA claim is therefore misplaced.

The State also relies (Br. in Opp. 7 n.3) on broad statements in some opinions that suggest that a State cannot be sued in any court without its consent. See generally *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 321 (1837); *Beers v. Arkansas*, 61 U.S. (20

How.) 527, 529 (1857); *Cunningham v. Macon & B. R.R.*, 109 U.S. 446, 451 (1883); *Hans v. Louisiana*, 134 U.S. 1, 16 (1890); *Ex parte New York*, 256 U.S. 490, 497 (1921); *Monaco v. Mississippi*, 292 U.S. 313, 322-323 (1934). This Court reviewed many of those same cases in *Nevada v. Hall*, however, and concluded that they were directed to the question whether a State could be sued without its consent in federal court, and did not resolve the question whether a State could be sued in another forum. 440 U.S. at 420-421 & n.20 (citing as examples *Hans* and *Monaco*); *id.* at 437-439 (Rehnquist, J., dissenting) (relying on *Beers* and *Cunningham* to support the view that a State may not be sued without its consent in the courts of another State). Isolated statements in *Seminole Tribe* that mirror the earlier expressions of state sovereign immunity to private suits in general (see, e.g., 517 U.S. at 58, 69, 70-71 & nn. 12, 13, 14) likewise do not resolve the question, particularly given *Seminole Tribe*'s description of the Eleventh Amendment elsewhere in the opinion as directed only to the jurisdiction of the federal courts. For the reasons stated in *Nevada v. Hall*, and because the statements in *Seminole Tribe* and prior cases cannot be reconciled with the decisions in *Hall*, *Hilton*, and *Reich*, they are not controlling here.

D. ENFORCEMENT OF THE FLSA IN STATE COURT AS PROVIDED BY CONGRESS PROTECTS THE PERSONAL RIGHTS OF EMPLOYEES AND DOES NOT IMPLICATE THE CONCERNS FOR STATE SOVEREIGNTY THAT UNDERLIE THE CONSTITUTIONAL DOCTRINE OF STATE IMMUNITY FROM SUIT IN FEDERAL COURT

The Maine Supreme Judicial Court concluded that it would make no sense to hold that the Constitution

prevents Congress from authorizing an action against the State in federal court, but permits Congress to authorize employees to recover the wages to which they are entitled by bringing an action in state court. That conclusion ignores the distinction drawn by the Constitution itself between the two forums, as well as the very different balance of federal and state interests that are implicated in the two situations.

1. When state employees are barred from bringing an action for make-whole relief in federal court, the sole consequence is that they must seek such relief in a different forum. If state employees are precluded from seeking such relief in state court as well, however, vindication of their substantive federal rights would be severely threatened.

The State suggests (Br. in Opp. 18-19) that the FLSA may still be enforced through actions brought by the Secretary of Labor. In 1974, however, Congress determined, based on experience under the Act, "that the enforcement capability of the Secretary of Labor is not alone sufficient to provide redress in all or even a substantial portion of the situations where compliance is not forthcoming voluntarily." S. Rep. No. 690, *supra*, at 27. Congress also concluded that, "[s]ince the 1974 Amendments extend FLSA coverage to additional state government employees, it is now all the more necessary that employees in this category be empowered themselves to pursue vindication of their rights." *Ibid.* We have been informed by the Department of Labor that its more recent experience confirms Congress's judgment that private enforcement is necessary to ensure that state employees receive the wages to which they are entitled by federal law.

Moreover, every employee, public or private, has a personal employment relationship with his or her

employer, under which services are exchanged in return for compensation paid by the employer in accordance with contractual obligations and applicable state or federal law. And insofar as the FLSA is concerned, Congress has declared that any employer (including a State or state agency) "shall be liable" to each individual employee personally for the amount of any unpaid minimum wages or overtime compensation owing under the Act and has conferred a personal right on the employee to recover the amounts owed. 29 U.S.C. 216(b). The Constitution should not be construed to require that Congress leave the vindication of a right so integral to personal autonomy and well-being as the recovery of wages due under federal law in exchange for one's own labor to either the discretion of the State that owes the wages or the discretion of federal officials who must operate under their own enforcement priorities and resource limitations. Consistent with the premises of our constitutional structure, then, it was entirely appropriate for Congress to "create[] obligations in justice that courts of the forum state would enforce." *Printz*, 521 U.S. at 907.

The State also suggests (Br. in Opp. 18-19) that enforcement of the Act may be accomplished through actions against state officials for prospective relief under *Ex parte Young*, 209 U.S. 123 (1908). Under the FLSA, however, only the Secretary of Labor may seek prospective relief. 29 U.S.C. 211(a), 217. Employees may seek only back wages and liquidated damages; they may not seek prospective relief. 29 U.S.C. 216(b). The *Ex parte Young* alternative proposed by the State is therefore illusory here.

Even if the FLSA were amended to permit private actions for prospective relief, moreover, that would not give employees any legal mechanism for obtaining the

wages to which they are entitled for the work they have *already* performed. *Edelman v. Jordan*, 415 U.S. 651, 664-665 (1974). If an employer withheld wages that an employee had already earned, an order that did no more than direct the employer to compensate future overtime work in accordance with the law would not satisfy the most fundamental principle of remedial adequacy: It would not place the injured employee "in the [economic] situation he would have occupied if the wrong had not been committed." *Wicker v. Hoppock*, 73 U.S. (6 Wall.) 94, 99 (1867). And, correspondingly, such an order would result in an unjustified windfall for the employer. Furthermore, for employees who have been laid off, or who have changed employers, moved into an exempt position, or lost the opportunity for overtime work, prospective relief is no relief at all. For those employees, "it is damages or nothing." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). Thus, even if an *Ex parte Young* action were available, it would not be an adequate substitute for the private right of action for backpay and liquidated damages that Congress deemed necessary for enforcement of the Act.

In *Hilton*, this Court recognized the importance of the availability of a state forum for ensuring that rights guaranteed by federal law can be effectively vindicated when a federal forum is closed by virtue of the Eleventh Amendment. In holding that a private FELA action may be brought against a state employer in state court even though such a suit would be barred in federal court, the Court stressed that "the most vital consideration of our decision today * * * is that to confer immunity from state-court suit would strip all FELA * * * protection from workers employed by the States." 502 U.S. at 203.

If a State may refuse to entertain a private FLSA suit against a state employer, it would not strip state employees of *all* federal protection. For the reasons discussed above, however, the result could be to prevent effective vindication of rights guaranteed by federal law in many cases. In other situations, moreover, a ruling that Congress is constitutionally barred from providing for private suits against a State in state court unless the State itself consents *would* strip state employees of all federal protections. That would occur if Congress chose not to vest administrative and enforcement authority in a federal agency, and instead addressed the problem at hand by enacting a personal federal right to a monetary recovery to be privately enforced in the accustomed manner. Congress did just that, for example, in the FELA, the statute at issue in *Hilton*. It is by no means evident that respect for state sovereignty and autonomy would be best served by an interpretation of the Constitution that required Congress to interpose a federal agency between a State and one of its employees, with the consequence that the enforcement action would, in all likelihood, be shifted from state to federal court.

2. A private right of action in state court does not raise the same federalism concerns that arise when one sovereign is made to appear in the courts of another. For the State, a state court is not "the instrument of a distant, disconnected sovereign." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. at 41. To the contrary, the state court is "ordained" by the State itself, *ibid.*, and indeed is an integral *part* of the State.

For that reason, there is a fundamental difference between a federal district court instructing a state agency on its obligations under federal law, and a state court performing that role. The holding in *Great*

Northern Life Insurance Co. v. Read, 322 U.S. 47, 54 (1944), that a State's waiver of immunity from suit in its own courts does not waive a State's immunity from suit in federal court, and the holding in *Younger v. Harris*, 401 U.S. 37 (1971), that a federal court may not enjoin a state criminal prosecution when the claim asserted could be raised in an ongoing state proceeding, both reflect a recognition that federal-court enforcement of federal law against a State raises serious federalism concerns that are simply not present when state courts enforce federal law. So, too, does the Tax Injunction Act, 28 U.S.C. 1341, which bars a federal court from enjoining the collection of state taxes when there is an adequate remedy in state court.

3. What is more, one of the principal bases for state sovereign immunity in federal court is inapposite when the suit is brought in state court. Foreclosing the availability of a federal court as a forum for a private FLSA suit against the State furthers the State's interest in playing a role in interpreting the contours of federal law and in integrating federal and state law into a single body of law governing the conduct of those within the State.

In the States there is an ongoing process by which state courts and state agencies work to elaborate an administrative law designed to reflect the State's own rules and traditions * * *. Where, as here, the parties invoke federal principles to challenge state administrative action, the courts of the State have a strong interest in integrating those sources of law within their own system for the proper judicial control of state officials.

Idaho v. Coeur D'Alene Tribe, 521 U.S. 261, 276 (1997) (principal opinion). Often, both federal and state law

might apply to a particular transaction or subject matter, and adjudication in state court allows a single court to resolve issues under both bodies of law and to construe state law harmoniously with federal law. "The two together form one system of jurisprudence, which constitutes the law of the land for the State." *Howlett*, 496 U.S. at 367 (quoting *Claflin v. Houseman*, 93 U.S. at 136-137). Preservation of that role for the state courts supports the constitutionally-based immunity of the States in federal court confirmed by the Eleventh Amendment; but that rationale does not support recognition of a constitutionally-based immunity of the States in the state courts themselves.

If a private right of action could not be brought in state court, enforcement of the FLSA against state employers would depend entirely on enforcement by the Secretary of Labor, who could be expected to bring such suits in federal court and who would not in any event be authorized to enforce any corresponding provisions of state law that might govern the same subject matter. That would leave state courts without any role in clarifying the contours of federal law in cases involving state employers, and would make it more difficult to harmonize the interpretation of federal and state law as applied to state employees. In contrast, if a private suit may be brought in state court, most FLSA litigation against the States would be conducted in state courts, furthering the States' vital interest in having their own courts interpret and integrate federal law as it applies to state officials.

4. One of the interests the Eleventh Amendment furthers is protection of a State's treasury, *Hess*, 513 U.S. at 39, and that interest is also implicated in suits brought against the State in state court. The Constitution, however, does not entirely insulate a State's

treasury from the effects of federal law. This Court sustained the constitutionality of the FLSA's minimum-wage and overtime provisions notwithstanding their impact on state treasuries. *Garcia, supra*. This Court has also held that prospective relief under *Ex parte Young* is available even when the impact on the state treasury is quite significant. *Milliken v. Bradley*, 433 U.S. 267 (1977); *Jordan*, 415 U.S. at 667. And this Court's decisions establish that the Secretary of Labor may bring an action against a State to recover backpay and liquidated damages regardless of its impact on the state treasury. *United States v. Texas*, 143 U.S. 621, 644-645 (1892); see *Missouri Employees*, 411 U.S. at 285-286.

Thus, while a State has an important interest in protecting its treasury, that interest does not override all others. In light of the Supremacy Clause, and the considerations discussed above, when Congress has authorized a private action against a State in state court for a violation of federal law, the State's interest in protecting its treasury must give way to the overriding interest in the vindication of federal law.⁷

⁷ That is particularly true in the circumstances presented here. A State's interest in determining when it will be subject to suit in its own courts for a violation of federal law loses all force when, as here, its courts entertain state-law claims of the same general type. A State does not have any legitimate interest in discriminating against the enforcement of a federal law that concededly applies to the State. Just as there is no implied sovereign immunity exception to the explicit duty of state courts under the Supremacy Clause to apply and enforce federal law as a general matter, there is no such exception to the particular obligation of the States under the Supremacy Clause not to discriminate against federal law or federal claims.

CONCLUSION

The judgment of the Maine Supreme Judicial Court should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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JANUARY 1999

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Article I, Section 8, Clause 3 of the United States Constitution provides as follows:

The Congress shall have Power

* * * * *

To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.

2. Article VI, Clause 2 of the United States Constitution provides as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. The Eleventh Amendment to the United States Constitution provides as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

4. 29 U.S.C. 203(x) provides as follows:

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

5. 29 U.S.C. 207(a)(1) provides as follows:

(a) **Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions**

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

6. 29 U.S.C. 216(b) and (c) provide as follows:

(b) **Damages; right of action; attorney's fees and costs; termination of right of action**

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as

may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any

such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

7. 29 U.S.C. 217 provides as follows:

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

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No. 98-436

Supreme Court, U. S.

FILED

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In The
Supreme Court of the United States
October Term, 1998

JOHN ALDEN, *et al.*,

Petitioners,

v.

STATE OF MAINE,

Respondent.

On Writ Of Certiorari
To The Maine Supreme Judicial Court

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Notwithstanding the Tenth Amendment, the Eleventh Amendment, and general principles of State sovereign immunity, does Congress have the power under the Commerce Clause to abrogate State sovereign immunity in state court when it lacks the power to abrogate such State sovereign immunity in federal court?

2. Is Maine prohibited from asserting its sovereign immunity in state court from a damages claim under the Fair Labor Standards Act when Congress lacks the power to abrogate such sovereign immunity, when Maine has not expressly waived its sovereign immunity, and when Maine is expressly exempt from suit under the most analogous state statute?

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STATEMENT OF THE CASE

The private petitioners, current and former probation officers, seek damages in state court from the State of Maine on the grounds that Maine did not properly pay them overtime pursuant to section 7 of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 207. The petitioners concede that they cannot seek such damages from Maine in federal court following *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). The petitioners, therefore, seek to have the Court endorse the counter-intuitive principle that when Congress lacks authority under the Commerce Clause to abrogate a State's sovereign immunity in federal court, it nevertheless has authority to abrogate such immunity in state court. We briefly recap the factual background and the private petitioners' federal and state lawsuits against the State of Maine.

Factual Background. In 1976, the Court ruled that the FLSA could not be applied constitutionally to States under the Tenth Amendment. *National League of Cities v. Usery*, 426 U.S. 833 (1976). Both before and after that decision, Maine paid certain state employees overtime (on more generous terms than the FLSA requires) under its collective bargaining agreements. Beginning in 1978, collective bargaining agreements between the State of Maine and some state employees stipulated that those workers whose positions required them to work irregular hours would receive an additional 16% premium over their base salary in lieu of overtime. See *Blackie v. Maine*, 75 F.3d 716, 719 (1st Cir. 1996). Probation officers' jobs satisfied this requirement, and thus they received the 16% non-standard premium in lieu of overtime. *Id.*

In 1985, the Court overruled *National League of Cities* and held that the FLSA could constitutionally be applied

to States. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Following that decision, "Maine promptly evaluated its work force to determine which state jobs came under the FLSA's overtime compensation provisions and which did not." *Blackie v. Maine*, 75 F.3d at 719. Although Maine concluded that many positions were covered by the FLSA (and thus began paying those workers overtime), it concluded that probation officers were exempt from the FLSA overtime provisions as professional employees, 29 U.S.C. § 213(a)(1). *Blackie v. Maine*, 75 F.3d at 719-20.

For probation officers, and other similarly situated state employees, Maine negotiated collective bargaining agreements that provided the affected workers would continue to receive the 16% non-standard premium in lieu of overtime so long as they continued to be exempt from the overtime provisions of the FLSA. *See id.* at 720-27. This was scarcely a contract of adhesion – the private petitioners later complained that their take-home pay could decrease (and, in fact, did decrease) when they began receiving overtime instead of the 16% non-standard premium in lieu of overtime. *See id.* at 725 n.5.

Federal Court Lawsuits. In December 1992, the private petitioners, along with other probation officers, filed suit in United States District Court against Maine, alleging that Maine had not properly paid them overtime under the FLSA. Petition Appendix ("Pet. App.") 2a. In addition to disputing the claims on the merits, Maine asserted affirmative defenses based on sovereign immunity.

Subsequently, the District Court held that the private petitioners were not entirely exempt from the overtime requirements of the FLSA, but were partially exempt as law enforcement officers. *Mills v. Maine*, 839 F. Supp. 3

(D. Me. 1993). The District Court then determined the method of calculating the overtime owed to the private petitioners. *Mills v. Maine*, 853 F. Supp. 551 (D. Me. 1994). This lawsuit was dismissed on Eleventh Amendment grounds before any party could seek review of these substantive rulings.

Because the private petitioners could receive, under the collective bargaining agreement, either the 16% non-standard premium in lieu of overtime *or* overtime, but not both, following the District Court's decision, beginning on February 6, 1994, Maine began to pay the petitioners overtime, which has continued to this day. Pet. App. 15a-16a. The petitioners do not – and cannot – allege that there is any on-going violation of the FLSA. Thus, this case involves solely a claim for retroactive monetary relief directly against the State. Pet. App. 16a.

While the private petitioners' FLSA overtime lawsuit was pending, the private petitioners filed a second lawsuit in United States District Court against the State of Maine. Proving that irony is no stranger to the law, the private petitioners alleged that Maine and five state officials had engaged in retaliation under the FLSA, 29 U.S.C. § 215(a)(3), by paying the private petitioners overtime instead of the 16% non-standard premium in lieu of overtime. This claim was rejected by the District Court and by the First Circuit. *Blackie v. Maine*, 888 F. Supp. 203 (D. Me. 1995), *aff'd*, 75 F.3d 716 (1st Cir. 1996).

In the FLSA overtime suit, the District Court appointed a special master to calculate the overtime after virtually all of the private petitioners chose to contest the accuracy of their own time records. *See Mills v. Maine*, 118 F.3d 37, 41 (1st Cir. 1997). Following extensive proceedings, the special master issued tentative rulings, largely rejecting the private petitioners' figures.

While the parties' objections to the special master's report were pending, this Court decided *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). In light of that decision, Maine moved to dismiss the federal lawsuit for lack of subject matter jurisdiction. The District Court dismissed the suit, which was affirmed on appeal by the First Circuit. *Mills v. Maine*, 1996 WL 400510 (D. Me. July 3, 1996), *aff'd*, 118 F.3d 37 (1st Cir. 1997). The private petitioners did not seek review of that decision in this Court, and thus the petitioners concede that Congress lacked the authority to abrogate State sovereign immunity in federal court when it exercised its powers under the Commerce Clause to enact the Fair Labor Standards Act.

State Court Lawsuit. Following dismissal of their federal court suit, in July 1996, the private petitioners filed the present suit against the State of Maine in the Maine Superior Court, seeking damages for the same past alleged FLSA violations. Joint Appendix ("Jt. App.") 9-10, 26-27. Once again, in addition to disputing the FLSA claims on the merits, Maine asserted an affirmative defense based on sovereign immunity. Jt. App. 17.

In July 1997, the Superior Court granted judgment on the pleadings to Maine based on the State's sovereign immunity defense. Pet. App. 14a-24a. "Simply put, if a plaintiff can't seek damages against the state for violations of federal law in federal court, the plaintiff can't seek damages in state court either." Pet. App. 20a.

The private petitioners then appealed to the Maine Supreme Judicial Court, sitting as the Law Court ("Law Court"). Over a dissent, in August 1998, the Law Court affirmed dismissal of the private petitioners' claims. *Alden v. State*, 715 A.2d 172 (Me. 1998); Pet. App. 1a-13a. The court rejected the anomalous result advocated by the

petitioners, namely, that the only forum for private enforcement of a federal statute was state court:

The postulate at work here, state sovereign immunity, is a "background principle" that is "embodied in the Eleventh Amendment." [*Seminole Tribe v. Florida*,] 517 U.S. at 72. Thus, the Eleventh Amendment does not delimit the scope and effect of state sovereign immunity. Rather, it reflects but one aspect of the states' inherent, more sweeping immunity from suits brought by private parties. A power so basic and profound would be an odd power indeed if it protected the states from suit in federal courts but provided no comparable protection in their own courts. If Congress does not have the power to abrogate state sovereign immunity with respect to federal causes of action brought in federal courts, as the *Seminole Tribe* case clearly held, then that limitation on congressional power may not be circumvented simply by moving to a state court. Accordingly, we conclude that sovereign immunity protects the State from defending this federal cause of action in its own courts.

Pet. App. 6a. In so holding, the Law Court relied on numerous prior decisions in which it had construed the State's sovereign immunity in state court as congruent with Eleventh Amendment immunity in federal court. *See* Pet. App. 3a-4a (collecting cases). The Law Court also rejected the petitioners' new argument on appeal that Maine had waived its sovereign immunity based on its conclusion that the Maine Legislature had enacted statutes that expressly exempt the State from overtime suits. Pet. App. 6a-7a (citing Me. Rev. Stat. Ann., tit. 26, §§ 663(10), 664(3) (West 1988 & Supp. 1998)).

SUMMARY OF ARGUMENT

The petitioners seek to strip the State of Maine of one of the core attributes of sovereignty, namely, its immunity from a private damages action in its own courts. First, the petitioners contend that under the Supremacy Clause, Maine cannot assert a defense of "state sovereign immunity" in state court because Congress expressly authorized individuals to sue States in state court under the Fair Labor Standards Act ("FLSA"). Second, the petitioners contend that Maine cannot "discriminate" against a private damages action under the FLSA because Maine has waived its sovereign immunity in state court against certain other types of damages claims. The petitioners' conclusions are not only wrong, but their approach fundamentally misconceives the analysis necessary to resolve the important federalism issues presented in this case. We consider each argument in turn.

Congressional Abrogation. The petitioners never seriously confront, much less answer, the fundamental question in this case – what is the source of Congress' power to abrogate Maine's sovereign immunity in its own courts? To answer this question, we must return to first principles and consider the historical evidence largely ignored by the petitioners.

It is beyond dispute that prior to the adoption of the Constitution, States were immune from private damages action in state court without their consent. During the debate concerning the ratification of the Constitution, even the most ardent federalists disclaimed any power under the Constitution to subject unwilling States to private damage actions.

There likewise is nothing in the plan of the convention that compels the conclusion States surrendered this

basic attribute of sovereign immunity when they ratified the Constitution. It should not be forgotten that the Constitution created a federal government of limited powers, and that the States and the people retained all powers not expressly or necessarily delegated to the federal government. The petitioners do not even cite the Tenth Amendment, much less consider its pivotal significance in this case.

Although the Constitution grants Congress the power to regulate commerce among the States, that does not begin to prove Congress has the power to abrogate a State's immunity from private damage actions when it acts pursuant to its Commerce Clause powers. The petitioners' contrary assumption that federalism does not place any limits on Congress' Commerce Clause powers cannot be squared with the historical record or with this Court's recent decisions interpreting the Commerce Clause, the Tenth Amendment, and the Eleventh Amendment. In brief, nearly 200 years of this Court's federalism jurisprudence converge on the same conclusion: "The principle is elementary that a State cannot be sued in its own courts without its consent. This is a privilege of sovereignty." *Railroad Co. v. Tennessee*, 101 U.S. 337, 339 (1879).

The petitioners contend that under the Supremacy Clause, federal law trumps any contrary state law. This is true, of course, when the federal law is valid. This argument, however, begs the fundamental question whether Congress' abrogation of sovereign immunity in state court under the FLSA is valid. We contend that the principles of federalism embodied in the history, structure, and language of the Constitution ineluctably leads to the conclusion that this federal law is not valid.

Discrimination. The petitioners contend that Maine has "discriminated" against a private cause of action under the FLSA in state court because it has agreed to hear "analogous" claims in state court. As a threshold matter, the Court should not review this matter because the petitioners did not adequately raise this issue below, and Maine's courts did not address this claim.

Maine has not discriminated against a federal overtime claim because the most analogous state claim is Maine's state overtime statute, and Maine is expressly exempt under that statute. Me. Rev. Stat. Ann., tit. 26, §§ 663(10), 664(3) (West 1988 & Supp. 1998). The petitioners' suggestion that the Court should not consider the most analogous state statute, but simply consider whether the State has waived its immunity for any damage claims by state employees, would subject States to any and all federal claims regardless of Congress' authority to abrogate a State's sovereign immunity. It would also create the perverse result of encouraging States to close their doors to all state claims for fear of creating unknown and unlimited federal liability.

Moreover, this search for "analogous" state statutes is fundamentally misconceived when Congress lacks the authority to abrogate Maine's sovereign immunity and there is not a scintilla of evidence to suggest that Maine is opposed to the policies animating the FLSA. It is simply not discrimination for a State to decide when it will consent to suit and, on what terms it will consent to suit, if Congress does not have the power to require a State to entertain a lawsuit against itself in its own courts.

ARGUMENT

I. CONGRESS LACKS AUTHORITY UNDER THE COMMERCE CLAUSE TO ABROGATE A STATE'S SOVEREIGN IMMUNITY FROM A PRIVATE DAMAGES ACTION IN STATE COURT.

A. The Narrow Issue Presented Is Not Congress' Power To Enact The FLSA Or Its Intention To Abrogate A State's Sovereign Immunity In State Court, But Rather Its Authority To Abrogate Such Immunity In State Court.

In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court held that Congress lacks the authority under the Commerce Clause to abrogate a State's immunity from suit in federal court under the Eleventh Amendment. The petitioners do not challenge the conclusion that the Fair Labor Standards Act ("FLSA") was passed pursuant to the Commerce Clause, and thus, although the FLSA expressly permits private damages actions in state and federal court, 29 U.S.C. § 216(b), Congress lacks authority to abrogate Maine's immunity from suit under the FLSA in federal court. *Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997). The issue in this case is not Congress' *intention* to abrogate Maine's sovereign immunity, but rather its *power* to do so. See *Seminole Tribe*, 517 U.S. at 55. Stated differently, the central question in this case is whether Congress congruently lacks authority to abrogate Maine's immunity from suit under the FLSA in state court.

The answer to this question has been foreshadowed by this Court's recent decisions concerning the scope of the Eleventh Amendment, and the consequence of concluding that private individuals cannot sue States in federal court: "The Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present

them, if the State permits, in the State's own tribunals." *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994) (emphasis added). Likewise, in rejecting the argument that States could ignore applicable federal law if Congress did not have authority to abrogate state sovereign immunity, the *Seminole Tribe* Court observed:

This argument wholly disregards other methods of ensuring the States' compliance with federal law: the Federal Government can bring suit in federal court against a State; an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law; and this Court is empowered to review a question of federal law arising from a state court decision *where a State has consented to suit*.

Seminole Tribe, 517 U.S. at 71 n.14 (citations omitted and emphasis added). Significantly, the Court did *not* state that Congress had authority under the Commerce Clause to abrogate a State's sovereign immunity from private suits for damages in its own courts.

Before turning to the dispositive issue in this matter, we emphasize the limited scope of Maine's sovereign immunity argument. *First*, we need not argue that Congress' power to regulate commerce "among the several States," U.S. Const. art. I, § 8, cl. 3, does not extend to Maine's noncommercial activity of paying its probation officers wages for performing services for the State of Maine in the State of Maine. See *United States v. Lopez*, 514 U.S. 549 (1995).

Second, it is also unnecessary to revisit the conclusion that the substantive requirements of the Fair Labor Standards Act can constitutionally be applied to the States without infringing upon the State's sovereignty under the Tenth Amendment. See *Garcia v. San Antonio Metropolitan*

Transit Authority, 469 U.S. 528 (1985). We simply note that this case underscores the hazards of shoehorning the traditional and essential functions of government into the rigid requirements of the FLSA, which were enacted to regulate private enterprise. The State's creative attempt to provide important governmental services and to fairly compensate probation officers for providing such services by paying them a 16% non-standard premium in lieu of overtime was stymied by the FLSA straitjacket. See *Blackie v. Maine*, 75 F.3d 716, 724-25 & n.7 (1st Cir. 1996).

Although the *Garcia* Court "perceive[d] nothing in the overtime and minimum-wage requirements of the FLSA * * * that is destructive of state sovereignty or violative of any constitutional provision[.]" 469 U.S. at 554, that does not resolve the issue whether subjecting States to private damage actions based on such requirements is, in fact, destructive of state sovereignty or violative of any constitutional provision. See *Seminole Tribe*, 517 U.S. at 71 (Congress' substantive Commerce Clause law-making authority distinguished from Congress' abrogation authority under the Commerce Clause). Thus, the petitioners' repeated reliance on *Garcia* in this case is misplaced. See Private Petitioners' Brief at 7, 12-13; Federal Petitioners' Brief at 3, 12-14, 25, 43. Simply stated, Maine need not be immune from the substantive requirements of the FLSA to be immune from private damage actions under the FLSA.

Third, we do not question the authority of the United States to sue the State for damages. See *Seminole Tribe*, 517 U.S. at 71 n.14; *United States v. Texas*, 143 U.S. 621, 644-45 (1892). The United States Secretary of Labor ("Secretary") is specifically authorized under the FLSA to file suit seeking damages, 29 U.S.C. § 216(c). Although the federal petitioners acknowledge this alternative, they argue that

it is unsatisfactory because the Secretary is overworked and lacks the resources to bring FLSA actions against States. See Federal Petitioners' Brief at 37-38. They argue that "[t]he Constitution should not be construed to require that Congress leave vindication" of rights under the FLSA "to either the discretion of the State that owes the wages or the discretion of federal officials who must operate under their own enforcement priorities and resource limitations." *Id.* at 38. The short answer is that the Constitution should not be construed simply to ease the administrative burdens on the federal government.

Fourth, we do not question the availability of prospective injunctive relief in appropriate cases. The Secretary is specifically authorized under the FLSA to file suit seeking injunctive relief, 29 U.S.C. § 217. The federal petitioners' administrative burden argument is no more persuasive here than before. Moreover, the petitioners do not – and cannot – dispute that an injunction is inappropriate in this case because Maine has complied with the substantive requirements of the FLSA since 1994 by paying overtime to its probation officers. See, e.g., Federal Petitioners' Brief at 6; Pet. App. 15a-16a.

Furthermore, under *Ex parte Young*, 209 U.S. 123 (1908), in cases in which there is not a detailed remedial scheme for enforcement against a State of a statutorily created right, private individuals can seek prospective injunctive relief against state officials to end a continuing violation of federal law. See *Seminole Tribe*, 517 U.S. at 73-76. The federal petitioners contend that this relief is "illusory" because, under the FLSA, only the Secretary can bring an injunctive action. See Federal Petitioners' Brief at 38. Even if that is true as a matter of statutory interpretation, that is of no more consequence to the constitutional issue in this case than the fact that such

prospective injunctive relief was also unavailable in *Seminole Tribe*. See 517 U.S. at 73-76.

Fifth, we do not question Congress' authority to abrogate Maine's sovereign immunity in either state or federal court when it validly enacts legislation pursuant to its express powers under section 5 of the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); cf. *Boerne v. Flores*, 521 U.S. 507 (1997) (legislation must "enforce" Fourteenth Amendment in order to be valid). Since the vast majority of federal statutes that abrogate the States' sovereign immunity from private damage claims in state and federal court, and certainly the most significant statutes, such as the Federal Civil Rights Act, 42 U.S.C. § 1983, were passed pursuant to Congress' express authority under section 5, the implication that Maine is seeking to exempt itself from a broad swath of federal private damage actions is unwarranted. In any event, this acknowledgement does not make a difference in this case because the petitioners do not challenge the conclusion that the FLSA was passed solely pursuant to Congress' Commerce Clause, not Fourteenth Amendment, powers. See *Mills v. Maine*, 118 F.3d 37, 42-49 (1st Cir. 1997); Private Petitioners' Brief at 6, 22-23; Federal Petitioners' Brief at 10, 29-30.

The petitioners' rhetoric notwithstanding, Maine's sovereign immunity argument is, therefore, quite limited. We need not argue in this case that Maine's sovereign immunity precludes Congress from applying the substantive requirements of the FLSA to Maine, that Maine's sovereign immunity precludes the federal government from suing the State for damages under the FLSA, or that Maine's sovereign immunity precludes the federal government (or, if the FLSA were amended, private

individuals) from suing the State or state officials for prospective injunctive relief under the FLSA.

We now turn to the dispositive issue in this case. The answer to the question whether Congress lacks the authority to abrogate a State's sovereign immunity in state court "must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court." *Printz v. United States*, 521 U.S. 898, 905 (1997). We consider each source in turn.

B. States Were Immune From Private Damage Actions In Their Own Courts Prior To The Adoption Of The Constitution.

The petitioners' theorem is that the Constitution necessarily authorized Congress to abrogate a State's sovereign immunity in state court. Before evaluating the axioms of that hypothesis, we set the stage and consider the extent to which States were immune from private damage actions without their consent in their own courts prior to the adoption of the Constitution.

The private petitioners do not mine this historical bedrock. On the other hand, the federal petitioners acknowledge that "[b]efore the Constitution was adopted, there was an established common-law principle that a State could not be sued in its own courts without its consent." Federal Petitioners' Brief at 29 (citing *Nevada v. Hall*, 440 U.S. 410, 414-16 (1979)).

Indeed, it is beyond dispute that at the time of the adoption of the Constitution, States were immune from suit from their own citizens in their own courts. "The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly

necessary to be formally asserted." *Hans v. Louisiana*, 134 U.S. 1, 16 (1890).

The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity.

Nevada v. Hall, 440 U.S. at 414.

Under these circumstances, we find puzzling the private petitioners' assertion that *Nevada v. Hall* provides the "strongest support" for their position. Private Petitioners' Brief at 28; see also Federal Petitioners' Brief at 10 (*Nevada v. Hall* "firmly support[s]" petitioners' position). In that case, the Court was required to choose between assertions of sovereignty by two States – Nevada, which had immunized its employees against tort claims, and California, which had established tort liability for persons injured on California's highways and had created courts to adjudicate such tort liability. Although the Court readily accepted the conclusion that the principles of sovereign immunity "support[] the conclusion that no sovereign may be sued in its own courts without its consent," *Nevada v. Hall*, 440 U.S. at 416, those principles "afford[] no support for a claim of immunity in another sovereign's courts." *Id.*

The Court thus held that Nevada's sovereign immunity in another sovereign State's courts was solely a matter of comity when its employees crossed its sovereign borders. *Id.* at 425-26. Nevada took California's tort laws and courts as it found them when it permitted its employees to drive in California. The Court concluded that the Tenth Amendment precluded Nevada from placing restrictions on California's state sovereignty expressed through its tort laws and its courts:

[I]n view of the Tenth Amendment's reminder that powers not delegated to the Federal Government nor prohibited to the States are reserved to the States or to the people, the existence of express limitations on state sovereignty may equally imply that caution should be exercised before concluding that unstated limitations on state power were intended by the Framers.

Id. at 425 (footnote omitted). Far from supporting the petitioners' position, *Nevada v. Hall* reinforces the conclusion that States have been immune from suit in their own courts since time immemorial.

In evaluating the historical record, we also rely on the dissenting opinion of Justice Iredell in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which is entitled to substantial respect since his views were enshrined in the Eleventh Amendment, which was enacted to overturn the decision in *Chisholm v. Georgia*. See *Hans v. Louisiana*, 134 U.S. at 12. Justice Iredell stated without contradiction that "there is no doubt that neither in the State now in question, nor in any other [State] in the Union, any particular legislative mode, authorizing a compulsory suit for the recovery of money against a State, was in being either when the Constitution was adopted, or at the time the judicial act was passed." *Chisholm v. Georgia*, 2 U.S. (2 Dall.) at 434-435 (Iredell, J., dissenting) (emphasis omitted, brackets added, and spelling modernized); accord *id.* at 452 (Blair, J.) (agreeing that States could not be sued in their own courts when the Constitution was adopted).

In reaching this conclusion, Justice Iredell relied not only on the experience in Colonial America, but also on the long-standing tradition in England in which the sovereign could not be sued without his consent. *Id.* at 437-46

(Iredell, J., dissenting). Indeed, one of the cited examples is a case in which a worker could only petition, but not sue, the Crown for unpaid wages. *Id.* at 440 (Iredell, J., dissenting). Since there is no doubt that States were immune from suit in their own courts at the time of the adoption of the Constitution, we now consider whether the Constitution altered that conclusion.

C. The Structure Of The Constitution And The Tenth Amendment Confirm That Congress Does Not Have Authority To Abrogate A State's Sovereign Immunity In State Court Under The Commerce Clause.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). "Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918-19 (1997) (quoting *The Federalist* No. 39, at 245 (J. Madison) (C. Rossiter ed. 1961)). The essence of federalism is that States retained their sovereignty except to the extent it necessarily was ceded to the federal government. As Justice Story, writing for the Court, explained:

The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had a right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remain unaltered and unimpaired, except so far

as they were granted to the government of the United States.

Martin v. Hunter's Lessee, 16 U.S. (1 Wheat.) 304, 325 (1816).

In evaluating whether States surrendered their immunity from suit in their own courts in ratifying the Constitution, we begin with first principles. "The Constitution created a Federal Government of limited powers." *Gregory v. Ashcroft*, 501 U.S. at 457; accord *United States v. Lopez*, 514 U.S. 549, 552 (1995). This limitation on the power of the federal government is reinforced by the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

The States thus retain substantial sovereign authority under our constitutional system. As James Madison put it: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which remain in the State governments are numerous and indefinite. * * * The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

Gregory v. Ashcroft, 501 U.S. at 457-58 (ellipsis added by Court) (quoting *The Federalist* No. 45, at 292-93 (J. Madison) (C. Rossiter ed. 1961)). We must therefore determine whether abrogation of a State's sovereign immunity in its own courts is one of the "few and defined" powers delegated to the federal government, *id.*, or whether it instead is "an incident of state sovereignty [that] is protected by a limitation on an Article I power." *New York v. United States*, 505 U.S. 144, 157 (1992) (brackets added).

In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.

Id. at 159. We consider first the Framers' views that sovereign immunity constitutes the core of sovereignty unaffected by the Constitution, and then consider whether the two constitutional provisions identified by the petitioners, namely, the Supremacy Clause and the Commerce Clause, alter that calculus.

1. The Framers Did Not Believe The Constitution Abrogated A State's Sovereign Immunity In State Court.

In interpreting the Constitution, we rely on the Framers' views, which the Court has "usually regarded as indicative of the original understanding of the Constitution." *Printz v. United States*, 521 U.S. 898, 910 (1997). There is no doubt the Framers believed that States were immune from suit in their own courts without their consent, and that the Constitution did not change that conclusion.

The Court has long relied upon the vigorous views of Alexander Hamilton, who was "from first to last the most nationalistic of all nationalists in his interpretation of the clauses of our federal Constitution." *Id.* at 915-16 n.9 (quoting C. Rossiter, *Alexander Hamilton and the Constitution*, 199 (1964)). Notwithstanding his nationalistic views, Hamilton made plain that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *The Federalist* No. 81, at 506

(A. Hamilton) (C. Rossiter ed. 1961) (quoted in *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996); *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)). Not only was State sovereign immunity inherent in the concept of sovereignty, but Hamilton emphatically argued that it was unaffected by the adoption of the Constitution:

This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. * * * [T]here is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.

The Federalist No. 81, at 506 (A. Hamilton) (C. Rossiter ed. 1961) (ellipsis added) (quoted in *Monaco v. Mississippi*, 292 U.S. 313, 324 (1934); *Hans v. Louisiana*, 134 U.S. at 13). Likewise, future Chief Justice Marshall argued that "[i]t is not rational to suppose that the sovereign power should be dragged before a court." 3 J. Elliott, *Debates on the Federal Constitution*, 555 (2d ed. 1836) (quoted in *Hans v. Louisiana*, 134 U.S. at 14). James Madison similarly observed that "[i]t is not in the power of individuals to call any state into court." 3 J. Elliott, *supra*, 533 (quoted in *Seminole Tribe*, 517 U.S. at 70 n.12).

The federal petitioners ignore the ratification debate altogether, and the private petitioners dismiss this debate in a footnote on the grounds that the ratification debate only concerned the extent to which the Constitution granted federal courts jurisdiction to hear cases against

States. See Private Petitioners' Brief at 24-25 n.9. The Framers' views are not so easily swept under the rug.

First, the Framers' views quoted above are not limited to federal court jurisdiction, but rather proceed from the premise that States cannot be sued in any court – state or federal – without their consent. See also *Seminole Tribe*, 517 U.S. at 70 n.12 (criticizing the dissent's similar reading of the ratification debates as "selective[]"). Second, the debate over the scope of federal jurisdiction only makes sense if the Framers believed that States could not be sued in their own courts, and therefore, the only open issue was whether the Constitution created a new federal forum in which States could be sued without their consent.

In this regard, it should not be forgotten that under the Madisonian Compromise, the Constitution only created the Supreme Court, and simply permitted Congress, at its option, to create lower federal courts. See *Printz*, 521 U.S. at 907. Thus, it was obvious that the federal government was going to rely on the numerous existing state courts, instead of the handful of federal courts that Congress might or might not create. Like Sherlock Holmes' dog that failed to bark, it is significant that no one – Federalist or Anti-Federalist – ever suggested that the Constitution empowered Congress to abrogate a State's sovereign immunity in its own courts. Since "[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself[,]" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239 n.2 (1985), it is readily apparent that neither the Federalists nor the Anti-Federalists believed that the Constitution *sub silentio* authorized Congress to abrogate a State's sovereign immunity in state court. We now

consider the constitutional provisions that the petitioners apparently believe the Framers overlooked.

2. The Supremacy Clause Did Not Abrogate A State's Sovereign Immunity In State Court.

The petitioners contend that this case is only about the Supremacy Clause, which provides:

This Constitution, and the Laws of the United States which shall be made In Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. Indeed, the petitioners put their thumb on the scale by framing the question presented as "[w]hether the Supremacy Clause * * * requires a state court to entertain a [FLSA] claim brought by a state employee against a state employer * * * notwithstanding a state-law defense of sovereign immunity." Federal Petitioners' Brief at i (emphasis and ellipses added); accord Private Petitioners' Brief at i. The petitioners' argument is expressly premised on the contention that Maine's sovereign immunity in its own courts is exclusively the product of state law. See Private Petitioners' Brief at 22-23.

This, of course, is not Maine's argument. We readily agree that state laws must yield to constitutionally valid federal laws. We contend, however, that under the Constitution, Congress cannot validly abrogate Maine's sovereign immunity in state court acting pursuant to its Commerce Clause powers. Thus, Maine is neither relying simply on a state-law defense of sovereign immunity nor conceding that Congress validly passed section 16(b) of the FLSA, 29 U.S.C. § 216(b), which attempts to subject

Maine to private damage actions in both state and federal court.

The Supremacy Clause certainly does not answer the question whether Congress has authority to abrogate Maine's sovereign immunity:

The Supremacy Clause, however, makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]"; so the Supremacy Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereign immunity and are thus not in accord with the Constitution.

Printz v. United States, 521 U.S. 898, 924-25 (1997) (brackets added by Court); see also *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States."). Accordingly, when a law enacted pursuant to the Commerce Clause violates the principle of State sovereignty, it is not a proper law enacted pursuant to the Commerce Clause, and is thus in the words of *The Federalist*, "'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" *Printz*, 521 U.S. at 923-24 (brackets added by Court) (quoting *The Federalist* No. 33, at 204 (A. Hamilton) (C. Rossiter ed. 1961)). In other words, the Supremacy Clause makes valid federal laws the supreme law of the land, but it does not make federal laws valid.

The petitioners are certainly wrong, therefore, in their assertion that when Congress provides for a federal claim to be heard in state court, the state courts are necessarily obligated to hear that claim under the Supremacy Clause. See Federal Petitioners' Brief at 17-18; Private Petitioners' Brief at 14-15. "The fact that Congress grants jurisdiction to hear a claim does not suffice to show

Congress has abrogated all defenses to that claim." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 787 n.4 (1991) (emphasis in original).

In this regard, the petitioners detach from its moorings this Court's observation that "the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." *Printz*, 521 U.S. at 907 (emphasis altered) (quoted in Private Petitioners' Brief at 15; Federal Petitioners' Brief at 18). This observation stands for the unremarkable proposition that state judges, like federal judges, must enforce valid federal laws, and it does not resolve the issue whether abrogation is a "matter[] appropriate for the judicial power" under the Constitution.

Since the petitioners do not dispute that Congress lacks the authority to abrogate Maine's sovereign immunity from a private damages action in federal court under the FLSA, the petitioners seek the anomalous result in which state courts are the only forum for private enforcement of a federal statutory right. This total reliance on state court judges not simply to apply federal law, but to carry out the administration of a federal statute through private enforcement actions, raises the specter of the federal government improperly "commandeering" the States. See, e.g., *New York v. United States*, 505 U.S. at 161.

In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority under the

Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

Id. at 166 (citations omitted) (quoted in part in *Printz*, 521 U.S. at 924).

This concern should not be limited to the State's executive and legislature branches. Chief Justice Marshall, writing for the Court, generally warned against requiring the federal government to rely on the States to carry out its objectives:

No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends.

McCulloch v. Maryland, 19 U.S. (4 Wheat.) 316, 424 (1819) (emphasis added). Indeed, in explaining why the Court must interpret its Article III jurisdiction expansively, Chief Justice Marshall, writing for the Court, explained that Congress could not be forced to rely on state courts because they were "tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States." *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 821 (1824). In sum, this Court's "commandeering" jurisprudence, culminating in *Printz*, undermines, not undergirds, the petitioners' attempt to establish state courts as the sole forum for private enforcement of a federal statute against a State.

Since the Supremacy Clause simply requires courts to enforce valid federal laws over contrary state laws, it is pellucidly plain that the petitioners' primary authority, *Howlett v. Rose*, 496 U.S. 356 (1990), is inapposite. In that case, the issue was "whether a state-law defense of 'sovereign immunity' is available to a school board otherwise subject to suit in a Florida court even though such a defense would not be available if the action had been brought in a federal forum." *Id.* at 359. The issue here is precisely the opposite – should the State have available a federal defense of sovereign immunity in state court that was available when the action was brought in a federal forum?

Florida had attempted to immunize a local school board under state law from liability under 42 U.S.C. § 1983. *Howlett* obviously did not involve a State defendant, and more importantly, the Court had previously ruled that, as a matter of federal law, municipalities and similar governmental entities were "persons" subject to liability under section 1983. See *Howlett v. Rose*, 496 U.S. at 376; *Monell v. New York City Department of Social Services*, 436 U.S. 658, 663 (1978). Furthermore, no one disputed – and no one could dispute – that Congress had authority to abrogate a school board's sovereign immunity pursuant to section 1983. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Indeed, as the *Seminole Tribe* Court noted, the express grant of power to Congress vis-à-vis States under section 5 of the Fourteenth Amendment stands in sharp contrast to the conspicuous absence of the grant of such power under the Commerce Clause. See *Seminole Tribe*, 517 U.S. at 59. Under these circumstances, the result in *Howlett* was foreordained, and irrelevant to the present inquiry.

The petitioners' Supremacy Clause argument could also render *Ex parte Young*, 209 U.S. 123 (1908), largely superfluous. Since the *Ex parte Young* exception for prospective declaratory and injunctive relief in federal court against state officials may be limited to circumstances in which "there is no state forum available to vindicate federal interests," *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 270 (1997) (Opinion of Kennedy, J.), it is relevant that the petitioners believe a state forum should always be available for the "effective vindication of rights guaranteed by federal law[.]" Federal Petitioners' Brief at 40. This is not the law. The Supremacy Clause does not give Congress the authority to abrogate a State's sovereign immunity, but simply enforces that authority if it is contained elsewhere in the Constitution.

3. The Commerce Clause Did Not Abrogate A State's Sovereign Immunity In State Court.

The petitioners treat it as self-evident that Congress has authority under the Commerce Clause to abrogate a State's sovereign immunity in state court. The Commerce Clause provides that "[t]he Congress shall have the Power * * * To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Quite simply, as the *Seminole Tribe* Court made clear under the Eleventh Amendment, the power to regulate commerce "among the several States" does not expressly or necessarily give Congress the power to abrogate a State's sovereign immunity.

The federal petitioners argue without citation that the States necessarily surrendered their immunity from suit in state court when they agreed to give Congress the power to regulate commerce among the several States. See Federal Petitioners' Brief at 29-30. The private petitioners

go even further, arguing without citation that not only did Congress necessarily obtain the power to abrogate a State's sovereign immunity under the Commerce Clause, but it is incumbent upon the States to prove clearly that such authority was not given to Congress. See Private Petitioners' Brief at 23.

The petitioners' belief that there are no limits on Congress' exercise of its enumerated powers cannot be reconciled with this Court's federalism decisions interpreting the Commerce Clause, *United States v. Lopez*, 514 U.S. 549 (1995), the Tenth Amendment, *Printz v. United States*, 521 U.S. 898 (1997), and the Eleventh Amendment, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). In contrast to the petitioners' constitutional construct, "Congress' authority is limited to those powers enumerated in the Constitution, and * * * those enumerated powers are interpreted as having judicially enforceable outer limits[.]" *United States v. Lopez*, 514 U.S. at 566 (emphasis and ellipsis added and citation omitted).

Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it * * * is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist.

Id. (brackets and ellipsis added by Court) (quoting *McCulloch v. Maryland*, 19 U.S. (4 Wheat.) 316, 405 (1819) (Marshall, C.J.)). As Chief Justice Marshall explained 180 years ago, the issue is not whether Congress acted pursuant to the Commerce Clause, but rather whether Congress acted pursuant to "the extent of the powers actually granted" pursuant to the Commerce Clause. *Id.* Thus, the

naked assertion that the States surrendered their sovereignty in their own courts simply because Congress enacted the Fair Labor Standards Act pursuant to the Commerce Clause is *ipse dixit* which is contrary to nearly 200 years of federalism decisions from this Court.

The petitioners' further assertion that it is incumbent upon the States to prove that the power of abrogation under the Commerce Clause was *not* delegated to Congress is contrary to the structure of the Constitution in which the federal government was granted only limited, enumerated powers. As Justice Story, writing for the Court, explained: "The government, then, of the United States can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." *Martin v. Hunter's Lessee*, 16 U.S. (1 Wheat.) at 326.

Thus, the burden is on the petitioners to produce "compelling evidence" that the Framers thought that States had surrendered their immunity from suit in their own courts when they granted Congress power to regulate commerce among the States. *Blatchford v. Native Village of Noatak*, 501 U.S. at 781 (footnote omitted). The petitioners do not produce any evidence, much less compelling evidence, to prove that there had been a "surrender of this immunity in the plan of the convention" when the Commerce Clause was adopted. See *The Federalist* No. 81, at 506 (A. Hamilton) (C. Rossiter ed. 1961); *Monaco v. Mississippi*, 292 U.S. at 324; *Hans v. Louisiana*, 134 U.S. at 13.

In this regard, it is relevant whether Congress attempted to use the significant, and presumably attractive, power the petitioners believe it received under the Commerce Clause, namely, the power to abrogate a

State's sovereign immunity in its own courts. *See Printz*, 521 U.S. at 907-10. Our research failed to disclose any early examples of Congress exercising this vast power over the States. *See also United States v. Lopez*, 514 U.S. at 568 ("for almost a century after adoption of the Constitution, the Court's Commerce Clause decisions did not concern the authority of Congress to legislate") (Kennedy, J., concurring).

The petitioners presumably do not attempt the Sisyphean task of proving that Congress' power to regulate commerce among the several States necessarily includes the power to abrogate a State's sovereign immunity from private damage actions because this Court concluded no such power existed just two Terms ago in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Although the petitioners are certainly correct that the Court was only deciding whether Congress had the power to abrogate a State's sovereign immunity in federal court, the Court did not reach its decision in a vacuum. Throughout its opinion, the Court broadly framed the question as whether Congress had the power under the Commerce Clause "to abrogate the States' sovereign immunity," *id.* at 58 (emphasis added), not the more limited question whether Congress had the power to abrogate the States' Eleventh Amendment immunity in federal court. *See generally id.* at 67-73 (discussing issue as relating to "state sovereign immunity" generally, not just immunity from suit in federal court).

After surveying nearly 200 years of decisions that came to this Court from both state and federal court, the Court concluded that States did not surrender their sovereign immunity exemplified in the Eleventh Amendment in the plan of the convention when the Commerce Clause was adopted as part of the Constitution:

In overruling [*Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (plurality opinion)], today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.

Seminole Tribe, 517 U.S. at 72 (footnote omitted). Since the Eleventh Amendment is simply the "embodi[ment]" of the "background principle of state sovereign immunity," there is no principled basis upon which to distinguish congressional authorization of suits by private parties against unconsenting States in state court from such suits in federal court. *Id.* In sum, the petitioners do not – and cannot – produce compelling evidence that the States necessarily surrendered their immunity from suit without their consent in their own courts when they granted Congress the power to regulate commerce among the several States.

D. The Principles Of The Eleventh Amendment Confirm That Congress Does Not Have Authority To Abrogate A State's Sovereign Immunity In State Court Under The Commerce Clause.

We have now demonstrated it was universally agreed that States were immune from suit in their own courts without their consent at the time of adoption of the Constitution, and that the Framers – and everyone else, for that matter – apparently believed that the Constitution did not alter that delicate balance. In contrast to the

heated debates over the scope of federal court jurisdiction under Article III, no one suggested that the Constitution granted Congress the power to abrogate a State's immunity in state court. Under the Tenth Amendment, therefore, the petitioners' claims must be rejected. We submit, furthermore, that the principles animating the Eleventh Amendment, as interpreted by this Court, cements that conclusion.

In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the Court concluded that Article III of the Constitution altered the balance of power between the Federal Government and States by authorizing suits against States in federal court. That decision, however, created such a "shock of surprise" that it was immediately overruled by the Eleventh Amendment. *Hans v. Louisiana*, 134 U.S. 1, 11 (1890); accord *Seminole Tribe*, 517 U.S. 44, 69 (1996). The Eleventh Amendment provides that:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

The Eleventh Amendment was designed to reaffirm the traditional notion of State sovereign immunity by eliminating the only extant exception to that immunity, *Chisholm v. Georgia*. Thus, the Eleventh Amendment "did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits." *Hans v. Louisiana*, 134 U.S. at 11.

Although the petitioners are correct in their assertion that the Eleventh Amendment, by its terms, does not apply in state court, that misses the point. The Court has made plain that "blind reliance upon the text of the

Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of.' " *Seminole Tribe*, 517 U.S. at 69 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 326 (1934); *Hans v. Louisiana*, 134 U.S. at 15). Indeed, the Eleventh Amendment "stand[s] not so much for what it says, but for the presupposition * * * which it confirms." *Seminole Tribe*, 517 U.S. at 54 (ellipsis added by Court) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)).

That presupposition [of State sovereign immunity], first observed over a century ago in *Hans v. Louisiana*, 134 U.S. 1 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." "

Seminole Tribe, 517 U.S. at 54 (emphasis deleted by the Court) (quoting *Hans v. Louisiana*, 134 U.S. at 13; The Federalist No. 81, at 506 (A. Hamilton) (C. Rossiter ed. 1961)). It therefore denigrates the importance of the Eleventh Amendment to simply treat it as a forum selection clause - States can "choose" to waive the immunity in federal court or they can be forced to hear such claims in state court. See Private Petitioners' Brief at 4, 26.

"For over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment." *Seminole Tribe*, 517 U.S. at 67. In other words, the Eleventh Amendment is "but an exemplification" of the fundamental rule of sovereign immunity that "a State cannot be sued without its consent." *Ex parte New York*, 256 U.S. 490, 497 (1921) (quoted in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984)); see also *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 267-68 (1997)

(Eleventh Amendment is "evidenc[e]" and "exemplifi[cation]" of "broader concept of immunity implicit in the Constitution") (citation omitted).

Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention.

Monaco v. Mississippi, 292 U.S. at 322-23 (citation and footnote omitted) (quoted in *Seminole Tribe*, 517 U.S. at 68). Thus, we rely on the principles, not just the language, of the Eleventh Amendment, to determine whether a State's sovereignty is offended by federal legislation. See, e.g., *Printz v. United States*, 521 U.S. 898, 918 (1997) (relying on "essential postulate[s]" under Eleventh Amendment in *Monaco* to address Tenth Amendment challenge); see also *id.* at 923-24 n.13 (Court may rely on "implication" as well as constitutional text to resolve federalism issues).

Throughout our history, the Court has understood the Eleventh Amendment to confirm the broader proposition that States are generally immune from suit without their consent:

It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as a defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution.

Cunningham v. Macon & Brunswick Railroad, 109 U.S. 446, 451 (1884) (emphasis added) (quoted in *Hans v. Louisiana*, 134 U.S. at 17). "A State, without its consent, cannot be sued by an individual[.]" *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1875).

The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. * * * To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectively to accomplish the substance of its purpose.

In re Ayers, 123 U.S. 443, 505-506 (1887). In other words, "[t]he Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Seminole Tribe*, 517 U.S. at 54 (quoting *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

The private petitioners ignore this rich historical tradition, while the federal petitioners dismiss a couple of these cases as immaterial *dicta* on the grounds that the issue before the Court was federal court jurisdiction in the face of the Eleventh Amendment. See Federal Petitioners' Brief at 35-36. Although that was the issue in the above-quoted cases, that does not assist the petitioners because the Court was considering whether the Eleventh Amendment should be interpreted broadly in federal court against a backdrop in which the States were immune from suit in their own courts. For example, in *Hans v. Louisiana*, 134 U.S. 1 (1890), the case was only filed

in federal court because “[t]he state courts have no power to entertain suits by individuals against a State without its consent[.]” and the Court was concerned about the need for symmetry in federal court. *Id.* at 18.

Furthermore, in numerous cases that came to this Court from state courts, the Court either considered the principles of sovereign immunity exemplified in the Eleventh Amendment, or broadly opined that States were immune from suit in their own courts. “No sovereign State is liable to be sued without her consent.” *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 321 (1838) (quoted in *Hans v. Louisiana*, 134 U.S. at 16).

It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals or by another State.

Beers v. Alabama, 61 U.S. (20 How.) 527, 529 (1858) (emphasis added) (quoted in *Hans v. Louisiana*, 134 U.S. at 17, and quoted in part in *Seminole Tribe*, 517 U.S. at 69).

The question we have to decide is not whether the State is liable for the debts of the bank to the railroad company, but whether it can be sued in its own courts to enforce that liability. *The principle is elementary that a State cannot be sued in its own courts without its consent.* This is a privilege of sovereignty.

Railroad Co. v. Tennessee, 101 U.S. 337, 339 (1879) (emphasis added) (quoted with approval in *Will v. Michigan Department of State Police*, 491 U.S. 58, 67 (1989)). Although not dispositive, this “oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment” reinforces the conclusion that the

Constitution did not grant Congress the power to abrogate a State’s sovereign immunity when it acts pursuant to its Commerce Clause powers. *Seminole Tribe*, 517 U.S. at 67.

In this case, all roads lead to Rome – the long historical tradition before the Constitution was adopted, the language and structure of the Constitution, including the Tenth Amendment, the ratification debates concerning the meaning of the Constitution, and the history and jurisprudence interpreting the Eleventh Amendment. Congress lacks the authority under the Commerce Clause to abrogate a State’s sovereign immunity in its own courts.

E. The Petitioners’ Remaining Authorities Do Not Prove That Congress Has Authority To Abrogate A State’s Sovereign Immunity In State Court.

In their attempt to prove that Congress has authority to abrogate Maine’s sovereign immunity in state court, the petitioners rely heavily on two cases that did not involve the Tenth Amendment, the Eleventh Amendment, or even principles of federalism. Neither case can support the weight of the petitioners’ argument.

In *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991), the issue was not Congress’ power to abrogate a State’s sovereign immunity, but rather an issue of statutory construction, namely, whether Congress intended to create a cause of action under the Federal Employees’ Liability Act (“FELA”) against a state-owned railroad, which, in turn, could be enforced in state court. 502 U.S. at 199. Because the Court’s “analysis and ultimate determination in this case are controlled and informed by the central importance of *stare decisis* in this Court’s jurisprudence[.]” *id.* at 201, the Court refused to disturb the

conclusion in *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184 (1964), that state-owned railroads were subject to the requirements of the FELA. *Hilton*, 502 U.S. at 201-203. The Court noted that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Id.* at 202 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)).

Hilton did not concern Congress' power to abrogate a State's sovereign immunity. The Court had previously assumed that Congress *did* have the power under the Commerce Clause to abrogate a State's sovereign immunity in FELA actions, see *Welch v. Texas Department of Highways*, 483 U.S. 468, 475, 478 n.8 (1987) (plurality opinion), an assumption that is unfounded following *Seminole Tribe*. Furthermore, the State did not challenge the conclusion that Congress had power to abrogate its sovereign immunity. See Brief for *Hilton* Respondent, No. 90-848, at 2 ("The South Carolina Public Railways Commission assumes, but does not concede, that Congress has the Constitutional authority to subject it to the FELA.") (footnote omitted); *id.* at 7 n.14 ("Respondent has not raised sovereign immunity as an affirmative defense to an otherwise applicable cause of action[.]").

Finally, the Court recognized that outside the context of *stare decisis* and interpretation of a presumably valid statute, there are important federalism concerns that militate in favor of equal treatment of the State in both state and federal court:

The resulting symmetry, making a State's liability or immunity, as the case may be, the same in both federal and state courts, has much to commend it. It also avoids the federalism-

related concerns that arise when the National Government uses the state courts as the exclusive forum to permit recovery under a congressional statute. This is not an inconsequential argument.

Hilton, 502 U.S. at 206. *Hilton*, therefore, provides no traction to the petitioners in their drive to force Maine's courts to entertain a private FLSA damages action against the State of Maine.

Relying on *Reich v. Collins*, 513 U.S. 106 (1994), the petitioners argue that the failure to afford the private petitioners a remedy in state court for violations of the FLSA "raises serious Fourteenth Amendment concerns." Private Petitioners' Brief at 32; see *id.* at 28-32; Federal Petitioners' Brief at 34. Although this claim is without merit, the Court should not even address it because this issue was not adequately raised or addressed below, and is not fairly included in the questions on which the Court granted certiorari. See *Yee v. Escondido*, 503 U.S. 519, 533 (1992).

The private petitioners did not raise this issue in the trial court, Jt. App. 26-37, and, not surprisingly, the trial court did not address this novel theory, Pet. App. 14a-24a. On appeal to the Law Court, the private petitioners did not raise this claim as an issue on appeal, Jt. App. 62 and only mentioned a due process claim in passing, Jt. App. 71. Once again, the Law Court did not address this fleeting theory, Pet. App. 1a-13a. Finally, in the petition for a writ of certiorari, the private petitioners did not mention a due process claim in either the questions presented or in the petition itself. The Court should not address such a stealth claim.

In any event, the private petitioners concede that "the line of cases culminating in *Reich v. Collins* does not deal directly with the effect of state sovereign immunity

rules across the full range of federal causes of action against the State[.]” Private Petitioners’ Brief at 31. In fact, this line of cases appears to be limited to tax cases, and actually a subset of tax cases – cases in which the State held out the illusion of an adequate post-deprivation remedy, and then, after the taxes were paid, engaged in “bait-and-switch” by declaring no such remedy existed. See *Reich v. Collins*, 513 U.S. at 111.

Reich has nothing to do with congressional abrogation of a State’s sovereign immunity – it only concerns due process and the requirement that when the State takes a person’s property, it must provide adequate pre-deprivation or post-deprivation process. It makes no sense to transport this due process theory to cases in which the State created neither the property interest nor the process. Congress obviously cannot create a property right when it acts without power to create a remedy. Cf. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (property interests not created by Constitution, but by independent sources such as state law). Otherwise, every time Congress abrogated a State’s sovereign immunity without authority, thereby precluding recovery in federal court, it would create a “due process” right to a remedy in state court.

II. IF CONGRESS LACKS AUTHORITY TO ABROGATE A STATE’S SOVEREIGN IMMUNITY, A STATE DOES NOT DISCRIMINATE BY DECLINING TO WAIVE ITS IMMUNITY IN STATE COURT.

The petitioners’ final arrow in their quiver is a claim that Maine has “discriminated” against a federal cause of action because Maine state courts hear “analogous” state law claims. See Private Petitioners’ Brief at 32-37; Federal

Petitioners’ Brief at 17-27. This also falls short of the target.

As an initial matter, we note that this case presents a poor vehicle for resolving this issue since Maine’s courts did not address this discrimination claim and the petitioners did not properly present this issue in state court.

With very rare exceptions, * * * we will not consider a petitioner’s federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams v. Robertson, 520 U.S. 83, 86 (1997) (*per curiam*) (citations omitted and ellipsis added) (dismissing writ as improvidently granted).

The private petitioners did not raise this issue in the trial court. Jt. App. 26-37. On appeal to the Law Court, the private petitioners raised for the first time a “waiver” argument and a “discrimination” argument, both of which were premised on allegedly “analogous” state statutes. Jt. App. 63-67, 71-77. Under Maine law, however, appellants cannot raise new issues on appeal:

No principle is better settled than that a party who raises an issue for the first time on appeal will be deemed to have waived the issue, even if the issue is one of constitutional law.

Cyr v. Cyr, 432 A.2d 793, 797 (Me. 1981) (citations omitted).

The Law Court did not address the petitioners’ discrimination argument, and rejected the factual premise of the petitioners’ waiver argument (which also dooms the petitioners’ discrimination argument). Pet. App. 6a-7a. The petitioners, therefore, seek review of an issue that Maine’s highest court did not address, either because it was procedurally barred or because it was without merit.

Even if the Court reaches the merits of this claim, it is unavailing because Maine has not violated "the non-discrimination principle crystallized in *Testa v. Katt*, 330 U.S. 386 (1947)[.]" Private Petitioners' Brief at 33. This principle only applies, however, in cases in which, *first*, Congress has validly passed a statute that commands compliance under the Supremacy Clause, *second*, the state court has refused to enforce the federal statute based on some policy disagreement, and *third*, the state court routinely hears similar cases under the most analogous state law. That is not this case.

The federal petitioners find the antecedent to the non-discrimination principle in *Clafin v. Houseman*, 93 U.S. 130 (1876). See Federal Petitioners' Brief at 18-19. In that case, the Court simply concluded that when Congress granted concurrent jurisdiction to the state courts under the Bankruptcy Act, a bankruptcy trustee could bring an action in state court when the state courts exercised jurisdiction under "like" laws. *Clafin*, 93 U.S. at 139. The case did not involve any federally-created rights – on the contrary, the trustee sought to bring the precise same cases permitted under state law, "common-law actions, ejectment, trespass, trover, assumpsit, debt, &c., or suits in equity[.]" *Id.* at 135. The *Clafin* Court repeatedly emphasized that the trustee could only bring such cases insofar as the state court's jurisdiction and the State's constitution permitted such actions. See *id.* at 136, 137, 141, 143. Finally, the Court repeated the long-held view that Congress could not "confer jurisdiction upon the State courts." *Id.* at 141 (citation omitted). *Clafin*, therefore, provides a shaky foundation for the petitioners' edifice.

The petitioners also rely heavily on *Mondou v. New York, New Haven & Hartford Railroad Co. (Second Employers'*

Liability Case), 223 U.S. 1 (1912), and *McKnett v. St. Louis & San Francisco Railway Co.*, 292 U.S. 230 (1934). See Private Petitioners' Brief at 33-34; Federal Petitioners' Brief at 19. In these cases, the Court concluded that an employee could bring a negligence action under the Federal Employees' Liability Act ("FELA") against a railroad in state court. The Court rejected the contention that Congress exceeded its powers in passing the FELA, and thus there was no issue about congressional authority to impose the FELA on the States. See *Mondou*, 223 U.S. at 46-55. Once again, although Congress had authorized the action, the underlying claim was not a federally-created right, but rather a run-of-the-mill negligence action that state courts routinely heard. *Id.* at 56-57.

The Court was careful to distinguish the FELA from an "attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure[.]" *Id.* at 56. This is precisely what the petitioners seek in this case. One of the more pernicious aspects of the petitioners' discrimination argument is their contention that not only are state courts required to exercise jurisdiction over FLSA claims against States, but they are pre-empted from applying their own procedures to such claims. See Private Petitioners' Brief at 18-19 & n.7; Federal Petitioners' Brief at 22-24. Accordingly, States would be powerless to partially waive their immunity or to deviate in any respect from the procedures and substance of the FLSA. We fail to see how this approach would "further the State's interest in playing a role in interpreting the contours of federal law and integrating federal and state law into a single body of law governing the conduct of those within the State." Federal Petitioners' Brief at 41.

In rejecting the state courts' attempt to decline jurisdiction over private parties, the *Mondou* Court was clear that the courts' jurisdiction "could not be overcome by disagreement with the policy of the federal Act[.]" *Howlett v. Rose*, 496 U.S. 356, 373 (1990) (citing *Mondou*, 223 U.S. at 57), and that the courts could not decline jurisdiction "solely because the suit is brought under a federal statute." *McKnett*, 292 U.S. at 233-34. There is not a scintilla of evidence that the Maine courts refused to entertain the private petitioners' claims because of any disagreement with the policy of the FLSA. Cf. *Gordon v. Maine Central Railroad*, 657 A.2d 785 (Me. 1995) (in private action, relying on FLSA to explicate state overtime statute).

In the end, these cases do not assist the petitioners because they stand for the simple "proposition that a state court must entertain a claim arising under federal law 'when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws.'" *Printz v. United States*, 521 U.S. 898, 906 n.1 (1997) (quoting *Mondou*, 223 U.S. at 56-57). *Mondou* and *McKnett* thus bring us back to the fundamental issue in this litigation because a state court's ordinary jurisdiction does not extend to a claim in which the State is immune from suit. See, e.g., *Georgia Rail Road & Banking Co. v. Musgrove*, 335 U.S. 900 (1949) (*per curiam*) (cited with approval in *Howlett v. Rose*, 496 U.S. at 372).

This leaves the petitioners' principal authority in its discrimination argument, *Testa v. Katt*, 330 U.S. 386 (1947). As before, this case did not involve either a claim against a State or a challenge to Congress' authority to abrogate a State's sovereign immunity. On the contrary, the question was whether the Rhode Island Supreme Court could refuse to enforce a "valid penal law" against a car dealer

based on its policy disagreement with the New Deal legislation that authorized the suit. *Id.* at 389; see also *id.* at 394 ("Our question concerns only the right of a state to deny enforcement to claims growing out of a valid federal law."). Under the Supremacy Clause the answer to that question was obvious. See *id.* at 389 (quoting Supremacy Clause). Indeed, the fundamental premise of *Testa* and its progeny, is that "state courts cannot refuse to apply federal law[.]" *Printz*, 521 U.S. at 928. This, however, does not advance the petitioners' cause since the federal constitutional scheme precludes their FLSA damages claim against States in either federal or state court. Particularly since the Court reiterated that a state court — could decline jurisdiction when it had a "valid excuse," *Testa*, 330 U.S. at 392 (quoting *Douglas v. New York, New Haven & Hartford Railroad Co.*, 279 U.S. 377, 388 (1929)), it should be apparent that the state courts have a "valid excuse" when Congress lacks the authority to abrogate a State's sovereign immunity in state court.

In concluding that Rhode Island was discriminating against a federal cause of action, the Court emphasized that the state court had declined jurisdiction because of a policy disagreement with the federal statute, *Testa*, 330 U.S. at 388, and that "[i]t is conceded that this *same type* of claim arising under Rhode Island law would be enforced by that State's courts." *Id.* at 394 (emphasis added). Neither feature is present in this case.

We submit that the non-discrimination principle has no place in this litigation. The *Testa* line of cases does not involve States or congressional attempts to abrogate a State's sovereign immunity in its own courts. These cases either assume or expressly state that Congress has the authority to enact the federal statute authorizing the lawsuit in state court. Although pejoratively described as

"discrimination," when Congress lacks such authority, a State's decision whether or not to permit such a lawsuit is simply a decision concerning the extent to which it will consent to suit.

When Congress lacks the authority to abrogate a State's sovereign immunity in its own courts, the appropriate model is this Court's waiver jurisprudence under the Eleventh Amendment. The question then would be whether there is sufficient evidence to conclude that the State has waived its sovereign immunity. *Cf. Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990) ("solicitude for States' sovereign immunity underlies the standard that this Court employs to determine whether a State has waived [its Eleventh Amendment] immunity") (brackets added).

In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

Edelman v. Jordan, 415 U.S. 651, 673 (1974) (brackets added by Court) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). The petitioners certainly cannot meet this stringent standard, and do not even attempt to do so.

Finally, even on its own terms, the discrimination standard is inapplicable because the petitioners cannot prove that Maine courts would hear "analogous" state claims. The private petitioners sued Maine seeking overtime under the federal overtime statute, the FLSA. As the Law Court found, there is no doubt that the most analogous state law claim is Maine's state overtime statute. Pet. App. 6a. It should be beyond dispute that Me. Rev.

Stat. Ann., tit. 26, § 664(3) (West Supp. 1997), "is the only statutory provision directly relevant to the central issue on appeal – the State's amenability to suit by state employees for overtime pay." Pet. App. 6a. This conclusion eviscerates the petitioners' discrimination claim because section 664(3) provides that "[t]he overtime provision of this section does not apply to public employees," *id.*, who are defined as "any person[s] whose wages are paid by * * * the State." Me. Rev. Stat. Ann., tit. 26, § 663(10) (West 1988); *see* Pet. App. 6a-7a.

The petitioners take two different approaches to this statutory chasm. The private petitioners simply ignore these statutes. *See* Private Petitioners' Brief at 35-36. The federal petitioners acknowledge the existence of these statutes, but then urge the Court to ignore the most analogous state statutes in its search for an analogous state statute because these statutes could be "an excuse that mask[s] the State's substantive disagreement with federal policy[.]" Federal Petitioners' Brief at 26 n.5. There are numerous problems with this approach.

First, this "standard" does not comport with the discrimination cases relied upon by the federal petitioners in which Court determined whether there were analogous state statutes by determining whether state courts entertained "like" claims, *Clafin*, 93 U.S. at 139, the same claims, *Mondou*, 223 U.S. at 56-67, or the "same type of claim[s]," *Testa*, 330 U.S. at 394. If the search for "analogous" state statutes is even an appropriate enterprise, the Court should search for the most closely analogous state statute. *Cf. North Star Steel Co. v. Thomas*, 515 U.S. 29, 33-34 (1995) (same approach in determining appropriate statute of limitations).

Second, the suggestion that the exemption for the State of Maine in Maine's state overtime statute could be

a mask for disagreement with the policies of the Fair Labor Standards Act is entirely fanciful. There is absolutely nothing in this record to support the conclusion that Maine courts declined to hear the private petitioners' claims for any reason other than Congress' lack of authority to abrogate Maine's sovereign immunity under the Commerce Clause. The fact that the FLSA was involved, as opposed to some other statute passed under Congress' Commerce Clause powers, was entirely beside the point.

Third, "[w]hen the issue of discrimination is assessed at the appropriate level of generality" advocated by the petitioners, Federal Petitioners' Brief at 26 n.5, it becomes no standard at all because it would require all States to hear all federal claims. The petitioners contend that the State has passed "analogous" state statutes because it has created a court of general jurisdiction, *see* Federal Petitioners' Brief at 16; Private Petitioners' Brief at 34, and because it has permitted certain damage claims to be brought against the State. *See* Private Petitioners' Brief at 35; Federal Petitioners' Brief at 24. This, of course, is no limit at all. The petitioners offer no principled basis for determining the "appropriate level of generality," except perhaps the level necessary to determine that there are, in fact, "analogous" state statutes.

Moreover, the suggestion that sovereign immunity is not an ingrained feature of Maine's constitutional landscape is mistaken:

This Court regards immunity from suit as "one of the highest attributes inherent in the nature of sovereignty" and, accordingly, it has said that, generally, a specific authority conferred by an enactment of the legislature is requisite if the sovereign is to be taken as having shed the protective mantle of immunity.

Cushing v. Cohen, 420 A.2d 919, 923 (Me. 1981) (quoting *Drake v. Smith*, 390 A.2d 541, 543 (Me. 1978)). It denigrates the importance of sovereign immunity generally, and in Maine in particular, to suggest that any state waiver of sovereign immunity should be treated as permitting the abrogation of all sovereign immunity.

Finally, the petitioners' approach is short-sighted because it simply encourages States to close their doors to all state claims to avoid the prospect that any waiver of the State's sovereign immunity could be treated as an "analogous" statute which requires the state courts to hear federal claims Congress lacks the authority to enact. Thus, rather than providing greater protections for individuals, the petitioners' discrimination theory, if expanded to include this case, would ironically and indubitably lead to a contraction of state-law protections for individuals. Certainly the better approach from both a constitutional and policy perspective is to determine whether the State has clearly waived its immunity to entertain a federal claim notwithstanding Congress' lack of authority to abrogate such immunity.

* * *

The Constitution "contemplates that a State's government will represent and remain accountable to its own citizens." *Printz v. United States*, 521 U.S. 898, 920 (1997) (citations omitted). Under its collective bargaining agreements, Maine generally paid its employees overtime on more generous terms than required by the Fair Labor Standards Act, and for employees such as probation officers that Maine thought were exempt from the FLSA, paid them a premium in addition to their regular salary that was more generous than the overtime they could receive under the FLSA. Maine, therefore, fairly paid its

probation officers for providing important governmental services to Maine's citizens. The private petitioners challenged this equilibrium by seeking retroactive money damages against Maine in federal court. Since the petitioners concede, as they must, that Congress lacks the power to abrogate a State's sovereign immunity in federal court, federalism dictates the result in this case – Congress also lacks the power to abrogate a State's sovereign immunity in state court. Succinctly stated, this "healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

CONCLUSION

The judgment of the Maine Supreme Judicial Court should be affirmed.

February 10, 1999

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In the Supreme Court of the United States

OCTOBER TERM, 1998

JOHN H. ALDEN, ET AL., PETITIONERS

v.

STATE OF MAINE

ON WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MAINE

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

**A. The Supremacy Clause Requires A State Court
Of Competent Jurisdiction To Hear FLSA Claims
Against The State**

1. The State does not challenge the holding in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), that Congress has power under the Commerce Clause to require state employers to compensate their employees in accordance with the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* The State contends, however, that Congress may not make that obligation legally enforceable by authorizing employees to file suit in a state court of competent jurisdiction to recover wages that the State has unlawfully withheld. The State makes that argument notwithstanding that its courts entertain suits against private employers under the FLSA and suits for monetary

relief against the State on a variety of claims, including claims for wages withheld in violation of state law.

As we explain in our opening brief (Br. 17-27), the State's contention conflicts with the most basic Supremacy Clause principles. When, as here, Congress has authority to impose a substantive legal obligation, it necessarily has the power to provide for the enforcement of that obligation by providing a cause of action for damages to the individual whose legal rights have been violated. *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396-397 (1906) ("There can be no doubt that Congress had power to give an action for damages to an individual who suffers by breach of the law. * * * In other words, if Congress had power to make the acts which led to the damage illegal, it could authorize a recovery for the damage.") (citation omitted). And, under the terms of the Supremacy Clause, state courts of competent jurisdiction are "bound" to enforce the federal cause of action, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2. As this Court has explained, the Supremacy Clause makes federal laws "as much laws in the States as laws passed by the state legislature" and "charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure." *Howlett v. Rose*, 496 U.S. 356, 367 (1990); see also *Testa v. Katt*, 330 U.S. 386, 389-390 (1947).

Fundamental principles in effect at the time the Constitution was adopted and in the early years of the Republic confirm that, when Congress has power to impose a legal obligation, it may also provide for the enforcement of that obligation through a private action by the party whose legal rights have been invaded. For example, Blackstone described it as "a general and indisputable rule, that where there is a legal right,

there is also a legal remedy, by suit or action at law, whenever that right is invaded." 3 William Blackstone, *Commentaries* *23. And in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), Chief Justice Marshall observed that our Government "has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

Nor does it matter that the basis for the Maine courts' refusal to enforce the federal overtime obligation is the State's assertion that it is immune from suits arising under federal law. The Supremacy Clause directive that a state court is "bound" to enforce federal law "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" applies as much to a State's sovereign immunity law as to any other state law that frustrates the vindication of a federal right. As the Court explained in *Howlett*, "[a] construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced." 496 U.S. at 376-377 (quoting *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980)).

Moreover, the Supremacy Clause principle that state courts may not frustrate or discriminate against federal law is fully applicable when a State is the defendant. As the Court stated in *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 207 (1991), when "a federal statute does impose liability upon the States, the Supremacy Clause makes that statute the law in every State, fully enforceable in state court."

2. The State argues (Br. 46-47) that it is not "discriminating" against federal law, because it does not

allow a state employee to sue under state or federal law to recover overtime compensation at the rate of one and one-half times the regular rate of pay. But that is just another way of saying that the State has a disagreement with the substance of the concededly valid obligation Congress has imposed on the State to pay overtime compensation. Under this Court's decisions, a State may not refuse to enforce federal law simply because it does not correspond to state law in every detail. A State is required to entertain federal-law claims at least as long as it opens its courts to claims of the same general type. *Howlett*, 496 U.S. at 361, 378, 380; *Testa*, 330 U.S. at 394. Here, the State entertains actions against private employers under the FLSA for overtime compensation at one and one-half times the regular rate of pay, and it entertains suits against the State for monetary relief, including suits seeking wages that have been withheld in violation of state law. See U.S. Br. 24; Alden Br. 35-36. Because those claims unquestionably are of the same general type as the claim asserted by petitioners in this case under any plausible view of such a test, the State's refusal to entertain petitioners' claim "flatly violates the Supremacy Clause." *Howlett*, 496 U.S. at 381.

Indeed, this case illustrates the extent to which, under the State's analysis, a State's assertion of sovereign immunity can be used to discriminate against federal law. Maine law permits state employees to bring an action in Superior Court to recover unpaid wages. See Me. Rev. Stat. Ann. tit. 26, § § 621(2), 626-A, 663(10), 670 (West 1988 & Supp. 1998). Thus, an hourly worker who works more than 40 hours in a week, but is not paid by the State for those additional hours of work, may bring suit to recover unpaid wages. *Ibid.* The only issue, then, is what substantive law should control the amount of recovery—i.e., the specific

hourly wage to which employees are entitled. Are employees entitled to recover time and a half, in accordance with federal law, or are they limited to straight time, as provided under state law?

The Supremacy Clause provides the answer. Where Congress acts within its powers, as it has here in establishing the FLSA overtime wage standards, the resulting federal law becomes the rule of decision in any suit asserting a claim for unpaid wages for overtime work. The state courts cannot choose to give effect to state causes of action for wages in which state law alone will be applied while barring such suits insofar as the plaintiff invokes controlling federal law.

B. The Eleventh Amendment, The Tenth Amendment, And Principles Of State Sovereignty Do Not Limit The Power Of Congress To Provide For Private Enforcement Of The FLSA In State Court

The State contends (Br. 17-40) that the Supremacy Clause is not implicated in this case, because Section 16(b) of the FLSA, 29 U.S.C. 216(b), violates principles of state sovereignty. In particular, it argues that the Eleventh Amendment, the Tenth Amendment, and sovereign immunity principles that predate the Constitution prevent Congress from using its power under the Commerce Clause to provide for a private cause of action against the State enforceable in state court.

1. The State's reliance on the Eleventh Amendment (Br. 31-37) is misplaced. By its terms, the Eleventh Amendment restricts only the "[j]udicial power of the United States." U.S. Const. Amend. XI. This Court has therefore repeatedly stated that the Amendment has no application in state court. *Hilton*, 502 U.S. at 204-205 ("[A]s we have stated on many occasions, 'the Eleventh Amendment does not apply in state courts.'" (citing cases).

In restricting the federal judicial power over the States, the Eleventh Amendment preserves a delicate balance between state and federal interests. Its purpose is to avert the "problems of federalism inherent in making one sovereign appear against its will in the courts of the other." *Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 293 (1973) (Marshall, J., concurring). See also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-240 n.2 (1985) (approving Justice Marshall's concurring opinion). As the Supreme Judicial Court of Maine recognized in *Thiboutot v. State*, 405 A.2d 230, 235 (Me. 1979), *aff'd on other grounds*, 448 U.S. 1 (1980), "[a]djudicating federal claims against state governments in the state courts is likely to produce less friction in federal-state relations" than requiring a federal claim against the State to proceed in federal court. At the same time, because the Eleventh Amendment has no application in state court, it does not operate to prevent vindication of federal law altogether.

The State contends (Br. 32-34) that this Court's Eleventh Amendment decisions have departed from the literal language of the Amendment and stand for the broader proposition that the Constitution protects States from suit in their own courts as well. That reading of this Court's Eleventh Amendment decisions is incorrect. The decisions upon which the State relies hold that, even though the literal terms of the Eleventh Amendment apply only to actions under the diversity grants of jurisdiction in Article III, the Eleventh Amendment reflects the broader constitutional principle that sovereign immunity limits all grants of authority under Article III. *E.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44, 64 (1996) ("[T]he Eleventh Amendment reflects the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Art.

III.") (internal quotation marks and citation omitted); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 326 (1934); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). Those holdings are grounded in the basic purpose of the Eleventh Amendment—to prevent Article III courts from exercising jurisdiction over suits against consenting States. *Seminole Tribe*, 517 U.S. at 64-65. Rather than seeking an interpretation of the Eleventh Amendment that would reflect its underlying purpose as a limitation on the Article III jurisdiction of the federal courts, the State in this case seeks a complete rewriting of the Amendment to serve an entirely different purpose—to free the State from the constraints of a provision of federal law altogether. Neither this Court's decisions nor the constitutional text supports such an interpretation of the Eleventh Amendment.

2. The State's reliance (Br. 18, 32) on the Tenth Amendment is similarly misplaced. The Tenth Amendment simply states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X. The Amendment therefore confirms that the powers conferred on the federal government are limited and that the States retain a significant measure of sovereign authority, but it "offers no guidance about where the frontier between state and federal power lies." *Garcia*, 469 U.S. at 550; see also *New York v. United States*, 505 U.S. 144, 156-157 (1992).

3. In arguing that Congress lacks any Article I power to provide for private actions against States in state court, the State ultimately relies (Br. 14-21) not on any constitutional text, but on the common-law principle in effect prior to the adoption of the Constitution that a State could not be sued in its own courts without

its consent. In the State's view (Br. 22-31), the Constitution did not alter that settled principle.

The State's argument ignores the foundation for the common-law rule that States could not be sued in their own courts. As the Court explained in *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907), a State's immunity from suit in its own courts was based "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." The Court reiterated that explanation in *Nevada v. Hall*, 440 U.S. 410, 416 (1979), confirming that a State's immunity from suit in its own courts rested on the straightforward proposition that the "right to govern * * * necessarily encompass[es] the right to determine what suits may be brought in the sovereign's own courts."

Given that "logical and practical" basis for the common-law immunity of a State in its own courts, it is entirely understandable why that common-law principle is superseded and rendered inapposite when Article I of the Constitution gives Congress power to impose a legal obligation on the States and when the Supremacy Clause renders that legal obligation the law of the State itself and "the law on which the right depends." Since the immunity is simply a corollary of the right to determine the substantive law, *Nevada v. Hall*, 440 U.S. at 415, the loss of the exclusive right to determine the substantive law that operates within the State eliminates the "logical and practical ground" on which the common-law right to an absolute immunity from suit was predicated. Thus, when Congress has power under Article I to impose a substantive obligation on the States, Congress likewise has authority to determine the extent to which that obligation may be enforced against a State in its courts. And the Supremacy Clause imposes a corresponding duty on state courts of

competent jurisdiction to enforce that law "as if the act had emanated from its own legislature." *Howlett*, 496 U.S. at 371. See U.S. Br. 29-30.

In light of the above, the State's repeated assertion that the Constitution did not give Congress authority to abrogate a State's preexisting immunity from suit in its own courts misconstrues the nature of that immunity. Prior to the adoption of the Constitution, States never had an immunity from suit in their courts that was independent of their sovereign authority to determine the substantive law that applied within their boundaries. The State is attempting in this case to assert an immunity from suit in its own courts that never existed—one that is completely divorced from its sovereign authority to determine the controlling substantive law. Because that kind of immunity "never existed" prior to the adoption of the Constitution, the question whether the Constitution gave Congress authority to abrogate it "cannot arise." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802 (1995).

The relevant inquiry therefore is not whether the Constitution gave Congress authority to abrogate a State's preexisting immunity from suit in its own courts. Instead, the relevant inquiry is whether the Constitution gave Congress authority to prevent the States from extending their preexisting immunity from suit in their own courts to a new and distinct class of cases—those in which Congress has substantive authority under the Constitution to impose a legal obligation on the States and has determined that private enforcement of that obligation in state court is appropriate. For the reasons we have discussed, the answer to that question is that Article I together with the Supremacy Clause gave Congress such power. In that more limited sense, the Constitution gave Congress

authority to abrogate a State's immunity from suit in its own courts.

Those principles are controlling here. Since Congress had authority under the Commerce Clause to require a state employer to pay its employees in accordance with the requirements of the FLSA, it also had authority under the Commerce Clause to provide for the enforcement of that obligation in state courts of competent jurisdiction. And since Maine courts are fully competent to enforce the FLSA against the State, they have an obligation under the Supremacy Clause to do so.

4. In support of its contrary view, the State cites (Br. 19-20) statements made by the Framers of the Constitution. In particular, the State relies on Alexander Hamilton's statement that "[i]t is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*," *The Federalist No. 81*, at 548 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), John Marshall's statement that "[i]t is not rational to suppose that the sovereign power should be dragged before a court," 3 Jonathan Elliot, *Debates on the Adoption of the Federal Constitution* 555 (2d ed. 1888), and James Madison's statement that "[i]t is not in the power of individuals to call any state into court," *id.* at 533. According to the State (Br. 21), those statements all proceed from the premise that a State cannot be sued in any court without its consent.

The statements relied upon by the State, however, must be understood in the context in which they were made. As the Court explained in *Nevada v. Hall*, those statements all "focused on the scope of the judicial power of the United States authorized by Art. III." 440 U.S. at 419. None of the statements addressed the very different question whether Congress would have authority to subject a State to suit in state court in those

circumstances in which the Constitution gave Congress power to impose a substantive obligation on the States.

Indeed, the State's reading of the Framers' statements conflicts with the actual holding and rationale of *Nevada v. Hall*. There, the Court held that the Constitution does not protect a State from a private action filed in the courts of another State. An essential component of the Court's reasoning was that the Framers' broad statements could not be understood as incorporating into the federal Constitution the principle that States cannot be sued in any court without their consent. 440 U.S. at 418-421. Instead, the Court concluded that the statements reflected only an understanding of the scope of Article III. *Ibid.* The Framers' statements therefore do not answer the question presented here.

5. The State also attributes significance to the absence of any evidence that the Framers anticipated that Congress would have power to subject States to suits in their own courts. Br. 21. The absence of such evidence is unsurprising. As this Court has explained, "the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role" even if the Framers could not have foreseen the exact form the exercise of those powers would take in the future. *New York v. United States*, 505 U.S. at 157.

The Framers would not likely have anticipated that Congress would use its authority under the Commerce Clause to impose an obligation on the States to pay their workers in accordance with federal wage standards in the first place. Nor would the Framers likely have anticipated that States would provide for suit against themselves in state court on a variety of claims, including claims against the State for wages withheld. The question presented here is—given that Congress *has* constitutionally imposed a substantive obligation on

the States to pay their workers in accordance with federal wage standards, and a resulting “liability” to those workers, see 29 U.S.C. 216(a), and given that state courts now *are* fully competent to entertain such claims—does Congress have authority to provide state employees with a right to sue in state court to recover the wages that a State owes under federal law? While there is no evidence that the Framers anticipated such a suit, “the powers conferred upon the Federal Government by the Constitution” permit such an exercise of power. *New York v. United States*, 505 U.S. at 157.

For substantially the same reasons, the State errs (Br. 29-30) in finding significance in the absence of any early legislation subjecting States to suit in their own courts. The early Congresses had a fundamentally different conception than did later Congresses of the appropriate federal role. The critical point is that such legislation falls within the scope of the Commerce Clause and the Supremacy Clause, and nothing in the Constitution limits such an exercise.

C. This Court’s Decisions Support Congress’s Authority To Provide For Private Enforcement Of The FLSA In State Court

1. a. In arguing that Congress lacks power to subject States to suit in their own courts for violations of controlling federal law, the State also fails to come to grips with this Court’s decision in *Hilton*. In that case, the Court held that a private action for damages under the Federal Employers’ Liability Act (FELA), 45 U.S.C. 51 *et seq.*, could be enforced against a state employer in state court, even though such a suit could not be brought in federal court. As we explain in our opening brief (Br. 32-33), that holding was necessarily premised on the view that a State’s immunity from suit in its own courts does not have the same constitutional footing as a State’s immunity from suit in federal court.

The State contends (Br. 37-39) that *Hilton* is not persuasive authority because the State in that case did not argue that Congress lacked authority to abrogate the State’s immunity from suit, and because the Court relied on principles of *stare decisis* in holding that the FELA creates a cause of action against state employers enforceable in state court. But as we point out in our opening brief (Br. 32), the State in that case did argue that principles of sovereign immunity inherent in the Constitution required Congress to clearly manifest its intent to subject States to suit in state court, which it did not do. Significantly, the Court squarely rejected that contention on the ground that the clear statement rule is a component of the Eleventh Amendment and the Eleventh Amendment does not apply in state court. 502 U.S. at 204-205. The Court only then proceeded to resolve on *stare decisis* grounds what it viewed as a pure question of statutory construction. *Id.* at 205. If, as the State contends, a State’s immunity from suit in its own courts stands on the same constitutional footing as its immunity from suit in federal court, the Court in *Hilton* could not have resolved the case the way it did. Instead of resolving the question as a matter of statutory construction, the Court would have been required to apply a constitutionally based clear statement rule, and to decide the case in favor of the State.

The State offers no response to that analysis of *Hilton*. Nor does the State offer any explanation for the Court’s concluding statement in *Hilton*, 502 U.S. at 207, that when “a federal statute does impose liability upon the States, the Supremacy Clause makes that statute the law in every State, fully enforceable in state court.”

b. The State also fails to reconcile its argument with *Reich v. Collins*, 513 U.S. 106 (1994). That decision holds that the State is required to provide a tax refund

remedy when it collects taxes in violation of federal law, "the sovereign immunity States traditionally enjoy in their own courts notwithstanding." *Id.* at 109-110. The State's view (Br. 40) that the principle that emerges from *Reich* is that a State has an absolute right to assert sovereign immunity in its own courts, except in a small subset of tax cases, has no constitutional or logical foundation. The Supremacy Clause does not operate only in a small class of tax cases. When, as here, Congress has acted constitutionally in imposing a legal obligation on the States, and has provided for enforcement of that obligation in state court, the Supremacy Clause requires a state court of competent jurisdiction to entertain the action, "the sovereign immunity States traditionally enjoy in their own courts notwithstanding." *Reich*, 513 U.S. at 109-110.

c. The State's analysis is also substantially undercut by this Court's decision in *Atascadero*. In *Atascadero*, this Court held that a federal Rehabilitation Act claim could not be brought in federal court against a State, because Congress had not abrogated the State's Eleventh Amendment immunity from suit in federal court. In dissent, Justice Brennan argued that the Court's holding would exempt States from compliance with the Rehabilitation Act. Justice Brennan assumed, as does the State here, that if Congress could not abrogate the State's Eleventh Amendment immunity from suit in federal court, then the State would also be immune from suit in state court. In the majority opinion, this Court squarely addressed Justice Brennan's concern and rejected it as "wholly misconceiv[ing] our federal system." 473 U.S. at 239-240 n.2. This Court explained that *state courts* would still enforce the Act against the States, and that the Eleventh Amendment was *not* a grant of "general immunity of the States from private suit . . . but merely [affected] the susceptibility of the

States to suit before *federal tribunals*." *Id.* at 240 n.2 (internal quotation marks and citation omitted). The Court added that "[i]t denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land." *Ibid.*

2. The State relies (Br. 34-36) on a number of earlier cases that contain broad dicta to the effect that a State may not be sued in any court without its consent. Those cases, however, either involve actions brought in federal court, *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446 (1883) *Board of Liquidation v. McComb*, 92 U.S. 531 (1875); *Hans v. Louisiana*, 134 U.S. 1 (1890), or they involve suits brought in state court to enforce state-law claims. *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257 (1838); *Beers v. Arkansas*, 61 U.S. (20 How.) 527 (1858); *Railroad Co. v. Tennessee*, 101 U.S. 337 (1879). None of those cases holds that Congress lacks authority to provide for an action against a State in its own courts in those circumstances in which Congress has authority to impose a substantive obligation on the States. Moreover, the broad dicta in those cases cannot be reconciled with this Court's more recent decisions, such as *Nevada v. Hall* and *Reich*.

3. The State also relies (Br. 9-10) on dicta in *Seminole Tribe*, 517 U.S. at 71 n.14, and *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994). *Seminole Tribe*, however, holds only that Congress does not have authority under the Commerce Clause to provide for a suit against an unconsenting State in federal court. In a footnote relied upon by the State, the Court stated that "this Court is empowered to review a question of federal law arising from a state-court decision where a State has consented to suit." 517 U.S. at 71 n.14. But that statement was unnecessary to the

holding, and, in any event, leaves unanswered the question whether the Court would also have power to review a state-court decision when a State has not consented to suit.

In *Hess*, this Court addressed whether a bi-state railway owned by the Port Authority of New York and New Jersey possessed immunity under the Eleventh Amendment from a FELA suit in federal court. The Court held that the Port Authority was an entity discrete from the two States and thus that it did not possess Eleventh Amendment immunity. 513 U.S. at 35-53. In the course of its opinion, the Court observed that "the Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals." *Id.* at 39. At the same time, however, the Court noted without any disapproval the district court's observation in that case that, under *Hilton*, the FELA claim there could have been brought by the private party against the Port Authority in state court because the Eleventh Amendment does not apply in state court. *Id.* at 34-35. The State therefore reads too much into the statement upon which it relies. More fundamentally, since the Court was not presented with the question whether Congress has power to provide for a private action against a State in state court in those circumstances in which it has the power to impose a substantive obligation on the States, the decision in *Hess* is inapposite here.

4. The State also seeks support for its position in *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, *supra*. Br. 23-25. The State's reliance on those cases is puzzling. Those cases hold that Congress may not commandeer state legislatures or executive branch officials to enact or administer a fed-

eral regulatory program. In both cases, the Court was careful to distinguish and reaffirm the duty of state-court judges to enforce federal law under the Supremacy Clause. *Printz*, 521 U.S. at 928 ("*Testa* stands for the proposition that state courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause."); *New York*, 505 U.S. at 178-179 ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause.").

5. The State also argues (Br. 27) that acceptance of our argument would render *Ex parte Young*, 209 U.S. 123 (1908), largely superfluous, since, in the State's view, that decision may only apply when there is no adequate remedy in state court. As a general matter, however, a plaintiff's right to sue in federal court under *Ex parte Young* does not depend on whether there is an adequate remedy in state court, but on whether the plaintiff is seeking prospective relief to end an ongoing violation of federal law. *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Quern v. Jordan*, 440 U.S. 332, 346-349 (1979). The lead opinion in *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 270 (1997), relied on by the State, suggested that the absence of an available remedy in state law could sometimes be an important factor in deciding whether an *Ex parte Young* suit should be permitted in federal court. But a majority of the Court rejected that view. *Id.* at 291-295 (O'Connor, J., joined by Scalia, J. and Thomas, J., concurring in the judgment); *id.* at 312-317 (Souter, J., joined by Stevens, J., Ginsburg, J., and Breyer, J., dissenting). And even the lead opinion made clear that the availability of a state-court remedy would not preclude plaintiff from seeking relief in federal court under *Ex parte Young* to prevent an ongoing violation of the Fourteenth Amendment, *id.* at 279-280,

and in other circumstances, *id.* at 277-278. The State's contention that acceptance of our position would make *Ex parte Young* largely superfluous is therefore incorrect.

D. Enforcement Of The FLSA In State Court Is Necessary To Ensure Effective Enforcement Of Federal Law

The State argues (Br. 11-12) that its refusal to enforce the FLSA in state court against state employers would not frustrate the operation of the Act. In particular, it argues that the United States could ensure compliance with the FLSA by suing the State for injunctive relief and seeking back wages and liquidated damages on behalf of the state employees in federal court. Effective enforcement of the Act, however, has always been substantially dependent on extensive private litigation in federal and state court. See *Employees of Dep't of Pub. Health & Welfare*, 411 U.S. at 297 n.12 (Marshall, J., concurring) ("It is obviously unrealistic to expect [federal] Government enforcement [of the FLSA] to be sufficient."). In 1996, the Act covered some 79 million employees. Yet the Department of Labor has only 930 Wage and Hour investigators for the entire country, one investigator for every 85,000 covered employees. The State's argument also entirely ignores the personal nature of the right that Congress has conferred. A person's right to the wages that he or she earned, and that Congress deemed necessary for economic well-being, should not be made to depend on the discretion of federal officials who must necessarily focus their limited resources on areas in which noncompliance is most acute.

The State's alternative argument (Br. 12-13), that Congress can ensure effective enforcement by authorizing private suits for prospective relief, is equally unpersuasive. Prospective relief fails to provide employees

with the earned wages to which they are entitled by federal law. For many employees, including those who have changed employers or who have been laid off, prospective relief is no relief at all. See U.S. Br. 38-39. And without the possibility of retrospective relief, a state employer, unlike any other employer, could wait to be sued before conforming its pay practices to the requirements of the Act. In any event, Congress has determined that private damage actions are necessary to ensure effective enforcement of the Act, and since that judgment is reasonable, it may not be second-guessed.

Finally, the State's argument, if accepted here, would have consequences far beyond the present case, allowing States to defeat federal rights whenever suit in federal court is barred by the Eleventh Amendment. The State's argument would apply even when a statute provides for no government enforcement action and even when damages are the only effective form of relief. In *Hilton*, for example, the Court noted that "to confer immunity from state-court suit would strip all FELA and Jones Act protection from workers employed by the States." 502 U.S. at 203. If the State's argument in this case were to be accepted, the right of state workers under the FELA and the Jones Act to compensation for work-related injuries would be rendered illusory. This Court has never permitted a State to insulate itself from the effective operation of a valid federal law, and it should not do so here.

The judgment of the Maine Supreme Judicial Court should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JOHN H. ALDEN, *et al.*,
v. *Petitioners*,
STATE OF MAINE,
Respondent.

On Writ of Certiorari to the
Maine Supreme Judicial Court

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REPLY BRIEF FOR PETITIONERS

Invoking "the historical record" and "this Court's federalism jurisprudence," the State of Maine submits that the Fair Labor Standards Act (FLSA) provision for state employee overtime pay suits against the State in state court "is not a valid" federal law. Brief for Respondent (Resp. Br.) p. 7.

The FLSA is in all other respects a valid exercise of Congress' Article I legislative power and contravenes no "state sovereignty" limits on that power. The FLSA enforcement provision is not valid, then, *only* if there is a free-standing "state sovereign immunity" constitutional limit on Article I that is broader and more absolute than the "state sovereignty" limit thereon. Respondent seeks to derive such a limit from three related propositions:

1. That "one of the core attributes of sovereignty" is the sovereign's "immunity from a private damages action in its own courts," Resp. Br. 6;
2. That, by reason of this sovereign immunity doctrine, "at the time of the adoption of the Constitution, States were immune from suit from their own citizens in their own courts," *id.* at 14; and
3. That the Framers proceeded on the understanding that the "State sovereign immunity inherent in the concept of sovereignty . . . was unaffected by the Constitution," *id.* at 20.

That argument cannot be sustained. As we show in this reply, Respondent's submission proceeds on a studied refusal to acknowledge, much less to confront, the unprecedented transformation of "the concept of sovereignty" worked by the Constitution. That transformation has the most profound significance for the States' "immunity . . . in [their] own courts" as an "attribute[] of [their]

sovereignty." Thus, by reason of its omission, Respondent distorts both the 'historical record' provided by the ratification debates and the import of this Court's "federalism decision."¹

1. *The Necessary Relation Between Sovereign Authority And Sovereign Immunity As An Attribute of Sover-*

¹ Two points on the nature of Respondent's submission are worthy of note at the outset.

(i) In our opening brief we argued first that if the FLSA is a constitutionally valid federal law, *this* Court's decision in *Howlett v. Rose*, 496 U.S. 358 (1990) demonstrates that state sovereign immunity rules cannot block the enforcement of federal rights in state courts when Congress has authorized such an enforcement action. We then argued that the FLSA is a valid federal law in that, apart from the Eleventh Amendment state sovereign immunity rule that limits federal court jurisdiction, there is no constitutional state sovereign immunity barrier to Congress' power to provide for the enforcement against the States of a constitutionally proper enactment.

Respondent does *not* contest our first argument. Indeed, Respondent in discussing the force of the Supremacy Clause here, Resp. Br. 22-27, "readily agree[s] that state law must yield to constitutionally valid federal lawss" in the state sovereign immunity area as in all others, *id.* at 22.

Respondent instead joins issue with us at the point of our second argument. And, in this reply we confine ourselves to the issue thus put into contention.

(ii) To gain motive power, throughout its submission Respondent frames the question as one of Congress' authority to "abrogate" state sovereign immunity. Resp. Br. 6, 7, 9, 14, *et seq.* That formulation all but assures the conclusion Respondent claims to be proving *viz.*, that there is a state sovereign immunity rule of constitutional dimension applicable here. For the "abrogation" doctrine applies to a situation in which it is settled that there is such a constitutional rule—the Eleventh Amendment state sovereign immunity rule—albeit a constitutional rule that is *not* applicable here. The question truly presented here comes one critical step earlier than the question in an "abrogation" doctrine case—whether there is any constitutional rule of sovereign immunity that limits Congress' Article I power to provide for private party enforcement suits against the State in state courts. That question should be considered on its own merits and not by confusing it with the "abrogation" doctrine question.

eignty. The concept of *sovereignty* denotes the ruling authority's exercise of its power over the body politic. From that starting point, the sovereign immunity rule constitutes an "attribute of sovereignty." In Justice Holmes' celebrated formulation, a "sovereign is exempt from suit on the ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

Under the constitutional plan, the States are, of course, sovereign in many regards but *not* in the regards enumerated in Article I as to which the United States is sovereign. As this Court "has frequently noted, the States unquestionably do 'retai[n] a significant measure of sovereign authority.' They do so however only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801-802 (1995) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985)). Thus, in the federal union created by the Constitution, when Congress enacts a valid federal law, in which a federal right is made enforceable in state court, "the Supremacy Clause makes [that federal] law 'the suprame Law of the Land,' and charges state courts with a coordinate responsibility to enforce [it] according to their regular modes of procedure." *Howlett v. Rose*, 496 U.S. at 367.

Given the nature of the constitutional plan, in all those respects in which the States are supreme ruling authorities and act as such, their pre-existing state sovereign immunity continues to follow from the premise of undiluted state sovereignty.

But it is also plain—and that is of the essence here—that in another qualitatively different situation brought into being for the first time by the Constitution, that pre-existing state sovereign immunity does not obtain. That is

the situation in which Congress properly exercises its Article I legislative power so as to extend a set of binding rules to the States, and in so doing provides for private party enforcement of those rules in the state courts—the very situation that gives rise to this case.

In this new situation the United States—and *not* the States—is the sovereign law-giver described by Justice Holmes. By the force of the Constitution, the United States has the supreme power to “make[] the law on which [the plaintiff’s] right depends;” to make that law binding on all those covered thereby; and to make that federal law enforceable in state court. And, such a governing federal law preempts any contrary state law. It follows that when Congress so acts, the state sovereign immunity doctrine derived from state sovereignty can not be made to serve as a bar to enforcement of the state liability rule imposed by federal law.

2. *The Constitution And The Ratification Debates.* In creating the new federal union, the Framers might of course have created a new state immunity doctrine attuned to the new constitutional sovereignty regime—a doctrine that would have imposed an independent barrier to the exercise of Congress’ otherwise inherent sovereign power to provide for the enforcement of the rights declared in its valid enactments through the normal processes of the law.

But there is no such provision in the constitutional text. And, nothing in the text, in the Constitution’s structure or in the authoritative constitutional materials remotely suggests that the Framers intended to impose such a novel and disabling limitation on the United States as a sovereign.

Indeed, the ratification debates on the status of state sovereign immunity under the Constitution speak to an entirely different issue—that the creation of the *federal*

judicial power through Article III of the Constitution might open the States to suit in federal court and do so in a manner that would undermine state sovereign immunity as an attribute of state sovereignty.

Those debates start from the point that the Constitution not only allocates certain sovereign authority to the United States but also subdivides that authority among the federal government’s three branches. With respect to the judicial power, the provision of Article III § 2 extending that power to “Controversies between a State and Citizens of another State” raised an important question not without difficulty. As we have seen, state sovereign immunity clearly existed as an attribute of state sovereignty in state courts prior to the Constitution. And, after ratification, in all instances in which a plaintiff’s case rested on state law, the States most certainly would retain such immunity in their own courts. But given the force of the sovereignty granted to the United States, and of the grant of an otherwise undefined federal judicial power over controversies involving a State, would such cases be justiciable in an Article III court, notwithstanding the State’s continued sovereignty as the maker of “the law on which the [plaintiff’s] right depends”?

The ratification debates on that question were framed by the general anxiety occasioned by the open-ended nature of the Article III authority to adjudicate cases coming within a head of federal jurisdiction. (Indeed, even the Madisonian compromise on the creation of the lower federal courts failed to eliminate Article III as a particular cause of controversy in the ratification process.) Against that background the Founders focused on the particular question of federal court suits on state obligations and on the interplay between federal sovereignty and state sovereignty where neither is clearly paramount. The fullest statement on the subject—Alexander Hamilton’s *Federalist* 81—makes that clear.

As we noted in our opening brief, Pet. Br. 25, n.9, Hamilton begins by stating that he is taking up the "suggest[ion] that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation." The Federalist No. 81 (A. Hamilton) (C. Rossiter ed. 1961), 506. And, as Respondent's brief notes, Resp. Br. 20, Hamilton then goes on to state:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. * * * [T]here is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.

Thus, Hamilton is concerned with the scope and nature of the federal judicial power—and with that power alone—and his position is that adoption of Article III should not serve to negate state sovereign immunity with respect to claims based on state obligations incurred in the exercise of the State's sovereign authority—a sovereign immunity that would continue to obtain in state court. Nothing in Hamilton's description of the area of concern or in his response to that concern, lends support of any kind to Respondent's claim that the Framers intended to impose a free-standing state sovereign immunity constitutional

limit on Congress' exercise of *its* sovereign legislative power.²

In short, Respondent fails entirely to marshal any support in the Constitution or in the constitutional background that supports its thesis that there is a free-standing state sovereign immunity constitutional limit on Congress' Article I power.

3. *The Eleventh Amendment Jurisprudence.* In its search for secondary support for that thesis, Respondent rests heavily on the Eleventh Amendment and its state sovereign immunity principle, on the decisions elaborating on that principle and on the "anomalies" that would allegedly result if that principle did not govern with regard to federal right suits in state court. None of these supports can take the weight Respondent would put on it.

(a) The Eleventh Amendment was the product of a clearly focused concern—that the Article III federal judicial power might subject the States to suits in the federal courts, and most particularly to suits on state obligations of the kind that established state sovereign immunity doctrine had precluded and would continue to preclude in state court. That was the concern that had roiled the ratification debates; that was the concern that *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) reactivated; and that was the concern—and the only concern—the Eleventh Amendment addressed.

Given this background, and despite the fact that the Eleventh Amendment law has not otherwise been a model

² The other materials assembled at Resp. Br. at 20, were equally directed to the Article III federal judicial power, and not to Congress' Article I legislative power. See *Hans v. Louisiana*, 134 U.S. 1, 14 (1890) (recognizing that the Marshall and Madison ratification debate commentaries are directed to the proper limit on the federal judicial power).

of stability, the Court has recognized from the first that the Eleventh Amendment has one office and one office only—to delimit the federal judicial power and the jurisdiction of the federal courts. As the Court emphasized in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), “the text of the Amendment itself is clear enough on this point: ‘The Judicial Power of the United States shall not be construed to extend to any suit . . .’. And our decisions since *Hans* had been equally clear that the Eleventh Amendment reflects ‘the fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Article III, *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 97198 (1984).’” 517 U.S. at 64 (ellipses and brackets in original); see also, *id.* at 68, 72-73. And precisely because the Eleventh Amendment is so limited, the Court has “stated on many occasions, ‘the Eleventh Amendment does not apply in state courts,’ *Will* [*v. Michigan Dept. of State Police*,] 491 U.S. at [58] 63-64 [(1989)], citing *Maine v. Thiboutot*, 448 U.S. 1, 9, n.7 (1980); *Nevada v. Hall*, 440 U.S. 410, 420-21 (1979).” *Hilton v. South Carolina Public Railways Comm’n*, 502 U.S. 197, 204-205 (1991).

Indeed, this Court has continuously treated on the merits with private party state court cases against a State raising a federal claim. In so doing the Court has not even suggested that the suit is foreclosed by the Eleventh Amendment itself or by any general constitutional state sovereign immunity principle. And, that is true with regard to the state court cases cited at Resp. Br. 36, that were in the same legal form as *Hans v. Louisiana*, 134 U.S. 1 (1890)—*viz.* cases on state obligations raising federal impairment of contract claims.³ That these cases

³ In *Beers v. Arkansas*, 61 U.S. 527 (1858), the Court rejected on the merits the bondholder’s claim that a newly enacted state law, which modified the State’s prior waiver of immunity by imposing

have gone on the merits is especially significant. For *Hans* is the fountain head of the rule that the Eleventh Amendment precludes federal court jurisdiction over cases

an additional procedural requirement in any suit to collect interest on the bond, worked an unconstitutional impairment of contract:

But the prior law was not a contract. It was an ordinary Act of legislation, prescribing the conditions upon which the State consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterward, if upon experience, it was found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law . . . [61 U.S. at 529.]

Railroad Co. v. Tennessee, 101 U.S. 337 (1879), is to the same effect. There, the State had consented to suit on certain obligations, but not to enforcement of any resulting judgments. When the State law permitting such adjudications was repealed, the creditors brought suit claiming an unconstitutional impairment. The Court rejected this claim on the merits: “it is clear, therefore that the right to sue, which the State of Tennessee once gave its creditors, was not in legal effect, a judicial remedy for the enforcement of contracts, and that the obligation of its contracts were not impaired, within the meaning of the prohibitory clause of [federal constitution] by taking away what was thus given.” *Id.* at 341.

See also the related case of *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257 (1838), where the Court rejected on the merits the claim that notes of the Bank of Kentucky were bills of credit “omitted by the state in violation of the Constitution of the United States.” *Id.* at 311.

Beers, *Railroad Co.* and *Briscoe*—all leading cases—are crystalline in this regard. But this is not to suggest that every nineteenth century case in this Court concerning disputes on state obligations is similarly transparent. While not cited by Respondent, there is to our knowledge the somewhat opaque decision in *Louisiana ex rel N.Y. Guar. & Indem. Co. v. Steele*, 134 U.S. 230 (1890). The Court there affirmed a state court judgment dismissing a private party action against a state auditor for a decree compelling the auditor to levy a tax. The action, the Court said, was in substance one against the State (which had not been made a party) and, in the words of the appellee, sought to compel the State to perform “an act of sovereignty that can only be performed by the legislative department of the government.” *Id.* at 230. *Cf. New York v. United States*, 505 U.S. 144 (1992).

bottomed on federal law, as well as federal court jurisdiction over cases bottomed on state law.

It is significant too, as we stressed in our opening brief, that *Seminole Tribe* confirms that the Eleventh Amendment and the Eleventh Amendment state sovereign immunity principle speak to the metes and bounds of the Article III federal judicial power and to that alone. The *Seminole Tribe* Court held:

Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. *The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.* [517 U.S. at 72-73 (emphasis added) (footnote omitted).]

Seminole Tribe's holding thus rests on the Eleventh Amendment restriction of Article III judicial power conjoined with the Constitution's "separation of power" rule that Congress has no Article I authority to expand the federal jurisdiction stated in Article III. *Seminole Tribe* does *not* rest on any direct general constitutional state sovereign immunity limit on Congress' Article I legislative power.⁴

⁴ In *Seminole Tribe* the Court, in responding to Justice Souter's point in dissent that its reading of the Eleventh Amendment would permit States to disregard federal law, provided the following list of methods by which state compliance could be achieved: suits in federal court by the federal government; actions by individuals against state officers under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908); and review in this Court from state court decisions where a State has consented to suit. 517 U.S. at 71 n.14. Respondent would make that list into an authoritative ruling that Congress has no Article I authority to provide for private party state court enforcement of federal law. Resp. Br. at 9-10. But the *Seminole*

Seminole Tribe thus stands in striking contrast to *General Oil Co. v. Crain*, 209 U.S. 211 (1908), (cited in our opening brief but not even alluded to by Respondent). In *Crain*, a state court action on a federal claim, this Court reversed the state court's refusal on the basis of a sovereign immunity defense to entertain that federal claim. The Court emphasized that if the Eleventh Amendment barred a suit in federal court, and state sovereign immunity were permitted to bar the same suit in a state court, an easy and improper way would be open to prevent the enforcement of federal rights. *Id.* at 226.⁵

(b) To be sure this Court's Eleventh Amendment jurisprudence rests on what the Court has termed a "background principle of state sovereign immunity" that is "rooted in a recognition that the States, although a union maintain certain attributes of sovereignty, including sovereign immunity," and that provides that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe*, 517 U.S. at 54 & 72 (internal quotations omitted).

But here again the Court has made it plain that these statements of the state sovereign immunity principle are

Tribe statute did not provide for private party state court suits against a State and thus did not remotely present any issue regarding Congress' Article I power or any supposed direct, general constitutional state sovereign immunity limit on that power. And, of course, the *Seminole Tribe* holding makes it plain that the Court did not rule that there is any such limit on Congress' Article I power. Given this context, Respondent greatly overreaches in its effort to convert an incidental, and evidentially non-exhaustive, list into a binding and comprehensive precedential ruling.

⁵ The federal right in question in *Crain* was a right claimed under the Fourteenth Amendment, while here the right claimed is one under a federal statute. But there is no difference, either in principle or in the applicability of the Supremacy Clause, with respect to the validity of state court reliance on state sovereign immunity as a defense.

Eleventh Amendment specific and are not statements of a general constitutional principle. As *Nevada v. Hall* 440 U.S. 410 (1979), puts the matter:

The language used by the Court in cases construing [the Eleventh Amendment's] limits, like the language used during the debates on ratification of the Constitution, emphasized the widespread acceptance of the view that a sovereign State is never amenable to suit without its consent. But all of these cases, and all of the relevant debate, concerned questions of federal-court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts. [*Id.* at 420.]

That being so, said the Court,

These decisions do not answer the question whether the constitution places any limit on the exercise of one State's power to authorize its courts to assert jurisdiction over another State. Nor does anything in Art. III authorizing the judicial power of the United States, or in the Eleventh Amendment limitation on that power, provide any basis, explicit or implicit, for this court to impose limits on the powers of California [to assert such a jurisdiction]. [*Id.* at 420-21 (footnotes omitted).]

By the same token the Eleventh Amendment state sovereign immunity decisions do *not* answer the question of whether the Constitution places any direct limit on Congress' Article I power to provide for the enforcement of a valid federal enactment binding on the State through state court private party suits. This question is entirely distinct from the Article III federal judicial power question treated in those Eleventh Amendment cases. Moreover, the question is equally distinct from the question of an independent sovereign's immunity in its courts as an at-

tribute of its sovereignty that was treated in the English common law and the general law of nations at the time of the framing of the Constitution.

(c) In addition to seeking to make these direct uses of the Eleventh Amendment and the Eleventh Amendment cases, Respondent seeks to leverage the Eleventh Amendment state sovereignty principle into a general constitutional limit on the federal government. In this regard, Respondent argues that such a limit is necessary to preclude "the anomalous result in which *state* courts are the only forum for private enforcement of a federal statutory right." Resp. Br. 24 (emphasis in original).

We agree that as a matter of abstract logic this result is not the most obvious, the simplest or the most straightforward. But in no way that matters can it be regarded as anomalous.

The constitutional plan for the division of sovereignty between the United States and the States, for the subdivision of federal sovereignty among the three branches of government, and for the dual role of the state courts in the enforcement of the full corpus of our law is not obvious, simple, or straightforward in any of its aspects. Nor is it one that grants all power to the United States or that provides for absolute state autonomy.

Given the totality of the plan—and especially the recognition of the particular sensitivity of federal court suits against a State—it is not at all anomalous that valid federal laws can be enforced against the States in private party state court suits but not in private party federal court suits. That is the result that most fully captures the logic of the plan. It gives Congress' sovereign powers their due and it does so in a way that protects the States from being subject against their will to the exercise of

the federal judicial power. And, it recognizes the special place of the States in the federal union by providing that the States alone have the special protection of being amenable to private party suits on federal claims in their own courts.

Indeed, we think it fair to say that the real anomalies reside in the result that Respondent advocates—that federal rights declared in valid federal laws binding on the States cannot constitutionally be made enforceable by the private party right holder.

It would, first of all, be anomalous to read into the Constitution an unprecedented state sovereign immunity limitation on Congress' law making power when nothing in the Constitution's text, structure, or history provides any support for that reading. And it would be especially anomalous to so constrain Congress' Article I power in the name of federalism when this Court has long recognized Congress' power to make valid federal laws binding on the States enforceable through federal court suits brought by the United States. On any view of State autonomy, such a federal court suit by the United States is more intrusive than a private party state court suit. Finally, it would be anomalous to deny Congress the ability to confer on federal right holders the independent power to enforce their rights and to make them entirely dependent on the Executive Branch for the vindication of those rights. It is Respondent's effort to invalidate the congressional law making power exercised here, not the proper recognition of the legitimacy of that power, that creates anomalies.

4. *Respondent's "Commandeering" and State Court Jurisdiction Arguments.* Both Respondents and its amici, the National Conference of State Legislatures, *et al.*, suggest that the Maine courts lack "jurisdiction"—or are not

"courts of competent jurisdiction"—to entertain FLSA private party overtime pay suits because state sovereign immunity is a "neutral state law" which limits the courts' jurisdiction. Resp. Br. 44; State Leg. Br. 6 n.6, 22.

Howlett v. Rose is squarely to the contrary. *Howlett* explained that state rules "denominated jurisdictional" do not "provide a court an excuse to avoid the obligation to enforce federal law if the rule does not reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect." 496 U.S. at 381.

Here, the Maine Superior Courts are courts of general jurisdiction with power to entertain suits against the State. Thus, the Maine sovereign immunity rule barring federal statutory claims is *not* one that goes to the Superior Court's jurisdiction or competence.⁶

The contention that a federal law providing for state court private party FLSA enforcement suits "raises the specter of the federal government improperly 'commandeering' the States," Resp. Br. 2, State Leg. Br. 12-15, likewise fails to do business with this Court's precedents.

The Supremacy Clause itself imposes a direct and specific duty on state adjudicatory tribunals to enforce valid federal laws, a duty that, given the Madisonian compromise, is central to the constitutional plan and the enforcement of federal law. *Idaho v. Coeur D'Alene Tribe of*

⁶ Whatever can be read into the one paragraph per curiam decision in *Georgia Railroad & Banking Co. v. Musgrove*, 335 U.S. 900 (1949), cited at Resp. Br., 44, it cannot be the proposition that a taxpayer alleging an unconstitutional exaction can be denied, on sovereign immunity grounds, any forum in which to obtain a remedy. That proposition was rejected in *Reich v. Collins*, 518 U.S. 106 (1994), which recognized that state sovereign immunity defenses to federal claims must give way in state courts even if the Eleventh Amendment would bar such claims in federal courts.

Idaho, 521 U.S. 261, 275 (1997) (opinion of Kennedy, J.).

That being so both of this Court's "anti-commandeering" principle decisions specifically recognize the constitutionally mandated duty of the state courts to enforce federal law. *Printz v. United States*, 521 U.S. 898, 907 (1997) ("the Constitution permit[s] imposition of an obligation on state judges to enforce federal proscriptions"); *New York v. United States*, 505 U.S. at 178 ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause."). *Printz* and *New York*, then, rather than putting into question the crucial role of state courts in enforcing federal rights, underscore that role.

5. *The Testa v. Katt Non-Discrimination Principle.* Respondent's first counter to our argument that the decision below violates the principle that state courts may not selectively close their doors to federal claims is that the point was not properly raised and preserved below. Resp. Br. at 41. That is not so. As we showed in our reply brief in support of the *certiorari* petition, the non-discrimination point was properly raised and fully briefed to the court below. Appellants' Brief, J.A. at 62, 71-77; Brief for U.S. as Amicus Curiae, J.A. at 136-140; Appellants' Reply Brief, J.A. at 155-157. And, the Maine Supreme Judicial Court reached that point—albeit by characterizing it as a "waiver" argument—and rejected it on its merits and not on any procedural ground. Pet. App. 6a-7a; Reply Br. at 3-4.

As to substance, Respondent makes two basic points: that the non-discrimination principle of *Testa v. Katt*, 330 U.S. 386 (1947), is not offended here because the state court bar does not rest on "any disagreement with the

policy of the FLSA," Resp. Br. at 44; and because the state courts entertain state causes of action against the State which are only analogous, but not identical, to the Petitioners' federal FLSA claim. Resp. Br. at 46-48. Both points are wide of the mark.

The State's motive in denying federal claimants access to its courts is beside the point. The relevant inquiry is an objective one which turns on whether the state courts entertain state causes of action which are of the "same type" or "analogous" to the barred federal causes of action. *Testa v. Katt*, 330 U.S. at 394; *F.E.R.C. v. Mississippi*, 456 U.S. 742, 776 n. 1 (1982).

Nor do *Testa* and *F.E.R.C.* require the federal cause of action to be identical to a state cause of action heard by the state courts for the non-discrimination principle to apply. See *Testa*, 330 U.S. at 394; *F.E.R.C.*, 456 U.S. at 776 n.1.

The state employee statutory wage claims routinely heard by the Maine courts are of the "same type" as Petitioners' federal claims. The non-discrimination principle therefore applies even if Maine law does not provide for overtime pay at the federally mandated premium wage rate.

CONCLUSION

For the foregoing reasons the decision and judgment of the Maine Supreme Judicial Court should be reversed.

Respectfully submitted,

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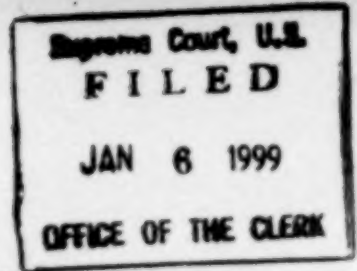
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No. 98-436



**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998**

JOHN H. ALDEN, *et al.*,

Petitioners,

v.

STATE of MAINE,

Respondent.

**On Writ of Certiorari to the
Maine Supreme
Judicial Court**

**BRIEF OF *AMICUS CURIAE* NATIONAL
ASSOCIATION OF POLICE ORGANIZATIONS
IN SUPPORT OF PETITIONERS**

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ARGUMENT:

I. Application of the Fair Labor Standards Act to the States and the provision for enforcement actions in state courts are valid exercises of Congress's authority under the Commerce Clause, Article I of the U.S. Constitution. In so doing, Congress has withdrawn or divested the States of some sovereignty under the Tenth Amendment, relevant to the scope of State sovereign immunity. Therefore, Maine must comply with the "overtime pay" provisions of the Fair Labor Standards Act, 29 U.S.C. § 207, and may be sued by state employees in a state court for alleged violations of this provision. 7

II. The Eleventh Amendment of the U.S. Constitution does not apply to causes of action to enforce federal law brought in state court, and thus a state court may not refuse to hear such a federal claim on sovereign immunity grounds in reliance on that amendment. The ruling in Seminole Tribe restricts only the judicial power of federal courts under Article III to hear private lawsuits against unconsenting states brought under laws enacted pursuant to Article I of the U.S. Constitution. 12

III. Under the Supremacy Clause of the U.S. Constitution, state courts are required to hear claims arising under federal law, with very limited exceptions. The Supremacy Clause overrides the State of Maine's assertion of sovereign immunity and consequent Maine

court refusals to entertain a cause of action by state employees to vindicate and enforce a right expressly conferred by the Fair Labor Standards Act. Affirming the decision below, barring an action brought by Maine state employees for violations of the FLSA, would effectively nullify that federal statute. It would disable the well-established principle that the laws of the United States are laws of the States and binding on all courts, with significant consequences for our system of government. 16

A. Under the Supremacy Clause, state courts of general jurisdiction cannot discriminate against and are therefore obligated to hear Federal claims, with very limited exceptions, especially (but not exclusively) if state courts of general jurisdiction would hear state law claims brought by the same or similarly situated plaintiffs against the State under some form of waiver of sovereign immunity. 17

B. Under the Supremacy Clause, the Fair Labor Standards Act (FLSA) preempts any State law, both statutes and common law (including state sovereign immunity), which thwarts or stands as an obstacle to the judicial enforcement of the rights expressly guaranteed public employees by the FLSA. 23

C. Affirmance of the lower court's decision in this case would have far-reaching consequences throughout the United States. It would result in inconsistent and disparate enforcement of the FLSA by state governments, effectively nullifying the protections and remedies available to state government employees in those States, such as Maine, which have invoked or could invoke sovereign immunity to bar employee lawsuits. It could also negatively impact other federal regulatory statutes applicable to and enforceable against the States. 28

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Police Organizations, Inc. (hereafter "NAPO") submits this brief in support of the Petitioners, John H. Alden *et al.*¹ NAPO seeks to reverse the judgment of the Supreme Judicial Court of Maine, which had affirmed the trial court's dismissal of the Petitioners' claims, that the State violated their rights to overtime pay under the Fair Labor Standard Act ("FLSA"), 29 U.S.C. § 201, *et seq.*

NAPO is a national non-profit organization, representing state and local law enforcement officers in the United States. It is a coalition of police associations and unions that serves to advance the interests and legal rights of law enforcement officers through advocacy, education, and legislation. NAPO represents 4,000 law enforcement organizations, with over 220,000 sworn law enforcement officers (including police officers, deputy sheriffs, state troopers, highway patrol officers, and traffic enforcement personnel), and 3,000 retired officers. For example, NAPO represents the Connecticut State Troopers, the Minnesota State Troopers, and the New York State Troopers, among other state employees. NAPO's affiliate, the National Law Enforcement Officers' Rights Center of the Police Education and Research Project, advocates the fundamental due process and workplace rights of officers.

NAPO's members have a significant interest in the important issues of law before this Court and the impact of the Court's decision on law enforcement officers. First, FLSA § 7 obligates the States to compensate covered employees at premium rates for hours worked in excess of the applicable statutory threshold or, alternatively, allows the States to provide compensatory time under certain circumstances (with limitations as to maximum number of

¹Pursuant to Supreme Court Rule 37.6, no counsel for any party in this case authored this *amicus curiae* brief in whole or in part, and no person or entity, other than the *amicus curiae* and its members, made a monetary contribution to the preparation or submission of the brief.

hours). 29 U.S.C. § 207. And law enforcement employees are entitled to overtime pay under the special provisions that apply to such employees. 29 U.S.C. § 207(k). To ensure compliance, FLSA § 16(b) authorizes employee suits for monetary relief "against any employer (including a public agency) in any ... State court of competent jurisdiction." 29 U.S.C. § 216(b). NAPO seeks to assure that State employees have a remedy to enforce their rights.

In view of this Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114 (1996), state courts are now the only judicial forum available to state employees under the FLSA to bring actions to recover unpaid overtime compensation. If the decision of Maine's highest court is not reversed, state employees, including law enforcement officers, will effectively be denied any remedy to vindicate their rights under the FLSA or any other Federal statute enacted pursuant to Congress's Article I powers.

WRITTEN CONSENT OF THE PARTIES

NAPO has received the written consents of the Petitioners (from their counsel) and the Respondent State of Maine (from the Department of the Attorney General), pursuant to Supreme Court Rule 37.3(a). These letters of consent have been filed with the Clerk of the Court, as required by the rule.

STATEMENT OF THE CASE

The *amicus curiae* adopts the factual statement in the petition for a writ of certiorari, filed by the Petitioners in this case. What follows is a shorter narrative of the facts and proceedings.

In December 1992, John Alden and sixty-four Maine parole and probation officers filed suit in U.S. district court against the State of Maine to recover overtime pay to which they were entitled under the FLSA, 29 U.S.C. § 201, *et seq.*, *supra*. The district court sustained their claim that they were "law enforcement" employees entitled to overtime pay. *Mills v. Maine*, 853 F.Supp. 551, 552 (D.

Me. 1994); 889 F.Supp. 3 (D.Me. 1993).

While this action was pending and before an award of any monetary relief, this Court decided *Seminole Tribe, supra*, which barred federal courts under the Eleventh Amendment from hearing Indian Gaming Regulatory Act claims against the States, or any other claims against the States arising under laws passed pursuant to Congress's Article I powers, unless the States sued waived sovereign immunity. Accordingly, the district court then dismissed the Petitioner officers' federal court action.³

Thereafter, in August 1996, the Petitioner officers filed this action in a state superior court, again alleging that the State had violated the FLSA overtime provisions. That court dismissed the officers' claim after the State invoked sovereign immunity. The officers appealed to the Maine Supreme Judicial Court.

That court, by a 4-2 panel vote, affirmed the superior court. It held that the Eleventh Amendment embodies state sovereign immunity and applies beyond the Amendment's literal terms to bar federal claims brought in state court, when those claims would be barred if brought in federal court. It ruled that Congress does not have the necessary power under the Constitution to subject the States to the overtime provisions of the FLSA in federal or state court. The Supreme Judicial Court also rejected the officers' contention that Maine discriminated against federal causes of action, in view of State statutes in which the State has made itself amenable to suit in the area of state employee wage claims; it ruled that no Maine statute authorized the precise state employee statutory cause of action stated in the officers' FLSA complaint.

This Court granted review on September 29, 1998.

³This decision was affirmed on appeal. *Mills v. State of Maine*, 118 F.3d 37 (1st Cir. 1997).

SUMMARY OF ARGUMENT

First, under the FLSA, as upheld in *Garcia v. San Antonio Metropolitan Transit Authority*, *infra*, some of Maine's sovereign power has been divested from it through the extension of the FLSA protections to state employees and the authority to enforce those rights through an action in state court. Yet, the Maine court has effectively immunized its state agencies from FLSA claims, accomplishing indirectly what the San Antonio Metropolitan District Authority sought but failed to achieve in *Garcia*, that is, an exemption from FLSA coverage. In effect, the Maine court has nullified Congress's constitutional authority under Article I to enact enforcement legislation that provides public employees with a remedy when federal law is violated. Because *Garcia* ruled that state sovereignty is not adversely infringed upon by the application of the FLSA provisions, the State of Maine cannot validly invoke sovereign immunity and deny its own employees a forum for a federal cause of action under the FLSA.

By holding that state sovereign immunity under the Eleventh Amendment protects the state from FLSA causes of action in its own courts, the Maine Supreme Judicial Court has violated the spirit of *Garcia*, has unjustifiably elevated the Eleventh Amendment over the Tenth Amendment on state sovereignty grounds, and has left the Petitioners and other state employees without a private right of action to enforce a constitutionally valid federal law in any forum.

Second, the Eleventh Amendment does not apply to the jurisdiction of *state courts* to hear claims under federal law (enacted pursuant to Article I of the Constitution) against state governments, as this Court ruled in *Hilton v. South Carolina Pub. Ry. Comm'n*, *infra*. As interpreted in *Seminole Tribe*, the Eleventh Amendment addresses the susceptibility of a state to private suit in federal court, not the general immunity of a state from suit in state court, and therefore the rationale of *Seminole Tribe* does not apply here. Thus, Maine's expansion of the Eleventh Amendment's jurisdictional reach beyond Article III federal courts must fail.

In order to protect the State's treasury in this case, the Supreme Judicial Court of Maine has relied upon a faulty argument concerning the need for symmetry between federal and state courts, namely that Congress cannot force the states to defend in their own courts the same claims that cannot be heard in federal courts. To the contrary, applying the principle concerning symmetry set forth in *Hilton*, symmetry is not an imperative that must override just expectations by public employees as to their federal rights to overtime pay and a minimum wage and the predictability of receiving such compensation.

Third, it is the Supremacy Clause, not the Eleventh Amendment, which provides the crucial guidance for determining whether or not a federal cause of action can be heard in a state court. In *Howlett v. Rose*, *infra*, this Court stated unequivocally the general principle that Federal law, as the "Supreme Law of the Land", is enforceable in state courts. The only exception to this general rule is if the State has a neutral or valid excuse to refuse to hear the case, which does not substantially curtail the federal right.

Sovereign immunity is not considered a neutral and valid excuse for refusing to hear a federal claim. Where a State court apparently evades federal law and discriminates against federal causes of action, on the basis of sovereign immunity, but has waived sovereign immunity to allow state claims by similarly situated plaintiffs to be heard against state government agencies, it violates the Supremacy Clause. Maine has enacted several laws conferring on state employees the right to bring actions to recover damages from the State, thus waiving Maine's common-law judicial doctrine of sovereign immunity. Thus, Maine's selective application of sovereign immunity to discriminate against federal claims is prohibited under the Supremacy Clause. In addition, Maine's invocation of sovereign immunity for the purpose of not paying the funds owed to its employees under FLSA has the effect of abrogating and nullifying the FLSA remedy available to those workers, because state court is the only forum now available, in reality, for affected employees to vindicate that right after *Seminole Tribe*. Thus, in this case, the nullification by Maine's courts of the

enforcement of FLSA's overtime protections by State of Maine employees directly violates the Supremacy Clause.

Maine's action violates the Supremacy Clause in another way. The Maine Superior Court's dismissal of Petitioners' FLSA claims stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Congress, a principle of preemption enunciated by this Court in *Hines v. Davidowitz*, *infra*, specifically, in this case, the enactment of the FLSA protections and remedies and their extension to public workers. Therefore, the Maine court's action is preempted by the Supremacy Clause, because it thwarts or conflicts with the FLSA and its enforcement.

The State of Maine's interest in this case, the reason for invoking sovereign immunity, is to *not* pay out additional funds from its treasury to its workers, reserving those funds for other purposes. On the other hand, it is the objective of the FLSA's overtime provisions to require that public agencies, as well as most private employers, pay their employees an overtime wage if they work over a certain number of hours. Following the principles enunciated by this court in *Hisquierdo v. Hisquierdo*, *infra*, and *McCarty v. McCarty*, *infra*, the recognition of Maine's sovereign immunity threatens grave harm to the clear and substantial federal interests set forth in the FLSA. And the consequence of Maine's effort to not pay additional wages sufficiently injures the objectives of the FLSA, so as to require nonrecognition by this Court. Affirming the Maine's Supreme Judicial Court's decision would elevate the State of Maine's interests over the federal interests, which would be a clear abrogation of the Supremacy Clause in the name of state sovereignty.

Hence, Maine's common law doctrine of sovereign immunity is preempted under the Supremacy Clause.

Fourth, affirming the decision of the Maine Supreme Judicial Court would send a signal to other States that they are free to refuse to hear private enforcement actions against state governments under the FLSA and are therefore able to nullify

Congress's extension of the FLSA coverage to all public employees. Allowing some States to effectively bar FLSA lawsuits by their employees, in order to escape the FLSA wage and overtime provisions, while other States allow such lawsuits, could have far-reaching and undesirable consequences. It would create disparate enforcement among the States, with individuals in those States invoking sovereign immunity facing an insurmountable obstacle in vindicating their Federal statutory rights. Significantly, other federal laws applicable to the States could be negatively impacted if this Court does not reverse the Maine court's decision. It is inconceivable that the uniformity of federal law and its application as the supreme law could long survive if the lower court's decision is allowed to stand.

For all of the above reasons, Maine state employees have a constitutional congressionally enacted right, under the FLSA, 29 U.S.C. § 216 (b), to bring a cause of action against the State of Maine in state court, and Maine's refusal to entertain those actions must be invalidated as unconstitutional.

ARGUMENT

I. Application of the Fair Labor Standards Act to the States and the provision for enforcement actions in state courts are valid exercises of Congress's authority under the Commerce Clause, Article I of the U.S. Constitution. In so doing, Congress has withdrawn or divested the States of some sovereignty under the Tenth Amendment, relevant to the scope of State sovereign immunity. Therefore, Maine must comply with the "overtime pay" provisions of the Fair Labor Standards Act, 29 U.S.C. § 207, and may be sued by state employees in a state court for alleged violations of this provision.

The Fair Labor Standards Act ("FLSA") of 1938, 29 U.S.C. §201, *et seq.*, was enacted to correct and eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers. Fair Labor Standards Act Amendments of 1966 ("FLSAA

of 1966”), Legislative History, 89th Cong., 2nd Sess (1966) reprinted in 1966 U.S.C.C.A.N. 3002. The FLSA established a nationwide minimum wage rate for industries covered by its provisions and a maximum hours standard provision that provided for compensation of at least one and one-half times the regular hourly wage rate applied to all hours in excess of a certain specified number.

Since 1938, the FLSA has been amended several times and Congress has expanded its coverage. In order to extend the Act’s coverage to the large groups of workers whose earnings were still unjustifiably and disproportionately low, the 1966 amendments extended the protection of the Act to employees employed in private activities which had theretofore been completely exempt from coverage, namely public employees employed in hospitals and related institutions, schools and institutions of higher education, and local transit operations. See FLSAA of 1974. The 1974 amendments completed this task and extended the Act’s minimum wage and overtime coverage to almost all non-supervisory Federal, State, and local government employees, including “employees of States, political subdivisions of states, and interstate governmental agencies.” *Id.* In addition, the 1974 amendment to FLSA § 16(b) clarified that FLSA suits by public employees may be maintained in a “federal or state court.”⁴ Previously, this provision had not specified the courts in which such cases could be brought.

The impetus of this later amendment was the Supreme Court’s decision in *Employees v. Missouri Public Health Dept.* 411 U.S. 279, 93 S.Ct. 1614, (1973). There, the Court held that, in enacting the 1966 amendments, Congress had not explicitly

⁴“Any employer who violates the provisions ... of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, ... An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by one or more employees for and in behalf of himself or themselves and other employees similarly situated.” 29 U.S.C. § 216(b).

provided that “newly covered State and local employees could bring an action against their employer in a Federal court under section 16.” FLSAA of 1974. While observing that Congress did not intend to deprive a State of its constitutional immunity to suit by its employees in a federal forum, the Court stated that public employees could bring suit in state court and sovereign immunity could not block such suits:

... Congress has the power to lift the State’s common-law immunity from suit insofar as that immunity conflicts with the regulatory authority conferred upon it by the Commerce Clause. Congress has done so with respect to these state employees in its 1966 amendments to the FLSA; by those amendments, Congress created in these employees a federal right to recover from the State compensation owing under the Act. While constitutional limitations upon the federal judicial power bar a federal court action by these employees to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights. [Citations omitted.]

411 U.S. at 297-298.

Therefore, in summary, the 1966 and 1974 amendments to the FLSA extended the minimum wage and maximum hour provisions of the Act to all public employees (certain limited categories exempted) and, provided private litigants with a remedy for employers’ (including States) violations of the Act, by allowing suits in either federal or state court.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), this Court held that Congress possessed the authority to impose the requirements of the FLSA on state and local governments. In that case, this Court stated that “Congress’ action in affording the San Antonio Metropolitan Transit Authority (SAMTA) employees the

protections of the wage and hour provisions of the FLSA contravened no affirmative limit on Congress' power under the commerce Clause." 465 U.S. at 556. In enacting the FLSA, Congress acted within its Article I powers and did not violate the Tenth Amendment by providing state employees with the protections afforded by the FLSA.⁵ See *id.* at 555-556.

It is well established that each State is a sovereign entity in our federal system and that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 506 (1890). However, state sovereignty is limited by the Constitution itself. In *Garcia*, this Court stated:

A variety of sovereign powers, for example, are withdrawn from the States by Article I, §10. Section 8 of the same Article works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation. [citation omitted]. By providing for final review of questions of federal law in this Court, Article III curtails the sovereign power of the States' judiciaries to make authoritative determinations of law. [citation omitted].

469 U.S. at 548-549.

While the States retain a significant degree of sovereign authority and may invoke the common law doctrine of state sovereignty to bar lawsuits against them, the power of state sovereignty is valid "only to the extent that the Constitution has not divested them (the states) of their original powers and transferred

⁵"The powers not delegated to the United State by the Constitution, nor prohibited by it to the States, are reserved for the States respectively, or to the people." U.S. CONST. AMEND. X.

those powers to the Federal government." *Id.* at 549. As stated by James Madison to the Members of the First Congress: "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the constitution of the States." *Id.* (quoting 2 Annals of Cong. 1897 (1791)). Generally, the "Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." *Id.* Thus, in *Garcia*, this Court concluded that the provisions of the FLSA did not unconstitutionally encroach on state sovereignty, because some sovereignty had been withdrawn or divested by the 1974 amendment subjecting the States to the FLSA:

Insofar as the present cases are concerned, then, we need go no further than to state that we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.

469 U.S. at 554.

Under *Garcia*, some of Maine's sovereign power or sovereignty has been withdrawn or divested from it by the application of the FLSA to its state employees and the enforcement of FLSA rights through a private damage action in state court.⁶

By holding that state sovereign immunity under the Eleventh

⁶That said, it must be noted that in the interest of compromise and accommodation, Congress has accorded the States more flexibility than that given to the private sector. FLSA § 7, 29 U.S.C. 207(o), allows states to provide compensatory time off, in lieu of overtime compensation, not to exceed a certain number of hours, pursuant to agreements or understandings with the employees.

Amendment protects the state from FLSA causes of action in its own courts, the Maine Supreme Judicial Court has done the following: It has violated the spirit of *Garcia*, has unjustifiably elevated the Eleventh Amendment over the Tenth Amendment on state sovereignty grounds, and has left the Petitioners and other state employees without a private right of action to enforce a constitutionally valid federal law, because this Court's decision in *Seminole Tribe, supra* precludes a FLSA private damages action in federal court. In effect, the Maine court has rejected Congress's enactment (under Article I powers) of enforcement legislation that provides public employees with a remedy when federal law is violated.⁷ In other words, the Maine court has effectively immunized state agency employers from FLSA claims, accomplishing indirectly what the San Antonio Metropolitan District Authority sought but failed to achieve in *Garcia*, that is, exemption from FLSA coverage. Because the FLSA's application does not adversely infringe on its sovereignty, the State of Maine cannot validly invoke sovereign immunity and deny its employees a forum for a federal cause of action.

II. The Eleventh Amendment of the U.S. Constitution does not apply to causes of action to enforce federal law brought in state court, and thus a state court may not refuse to hear such a federal claim on sovereign immunity grounds in reliance on that amendment. The ruling in *Seminole Tribe* restricts only the judicial power of federal courts under Article III to hear private lawsuits against unconsenting states brought under laws enacted pursuant to Article I of the U.S. Constitution.

In *Seminole Tribe, supra*, this Court held only that the Eleventh Amendment invalidates or renders inoperative statutory provisions

⁷The injunctive relief provision of the FLSA, § 217, gives federal district courts jurisdiction to restrain violations of § 215(a)(2). Under this provision, the district courts have the ability to restrain through equitable relief any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees. 29 U.S.C. § 217. After *Seminole Tribe*, the injunctive relief provision of the FLSA is no longer available.

passed under Article I of the Constitution, which subjects a State to suit in federal court if the State invokes sovereign immunity. The Court concluded that Congress lacked authority under any powers in Article I to abrogate the States' Eleventh Amendment immunity in federal court. 517 U.S. at 44. The Court stated that the Eleventh Amendment reflects "the fundamental principle of sovereign immunity [that] limits the grant of [federal] judicial authority in Article III. *Id.* at 63, 116 S.Ct. 1127-1128 (quoting *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 97-98, 104 S.Ct. 900 (1984)). Therefore, the court determined that Congress had exceeded its Article I powers by seeking to expand the jurisdiction of Article III federal courts beyond the limits imposed by the Eleventh Amendment.⁸

The Maine Supreme Judicial Court's expansion of *Seminole Tribe* and the protection afforded States in federal court is erroneously misplaced because a Maine Superior court is not an Article III court. *Alden v. State*, 715 A.2d 172 (1998) (Dana, J., dissenting). As this Court has stated, "[T]he Eleventh Amendment does not apply in state courts". *Id.*, quoting *Hilton v. South Carolina Pub. Ry. Comm'n*, 502 U.S. 197, 205, 112 S.Ct. 560, (1991); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63-64, 109 S.Ct. 2304, 2308 (citing *Maine v. Thiboutot*, 448 U.S. 1, 9 n. 7, 100 S.Ct. 2502, 2507, n.7, (1980)); *Nevada v. Hall*, 440 U.S. 410, 420-421, 99 S.Ct. 1182, 1188-1189, (1979). See also *Bunch v. Robinson*, 712 A.2d 585 (Md.Ct.Spec.App. 1998) ("The Eleventh Amendment addresses the susceptibility of a state to suit in federal court, not the general immunity of a state from private suit.").

In *Hilton*, this Court held that the Federal Employers' Liability Act ("FELA") created a cause of action against state-owned railroads in state court. 502 U.S. at 199. *Hilton*, an

⁸"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subject of any Foreign State." U.S. CONST. AMEND. XI.

employee of the South Carolina Public Railways commission, filed a FELA claim in federal court for an injury caused by the commission's alleged negligence. While this case was pending, the Supreme Court announced its decision in *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987), which held that the Jones Act did not abrogate the States' Eleventh Amendment immunity. Because the Eleventh Amendment immunity from the Jones Act suit would also apply to FELA suits, Hilton dismissed his federal court claim and refiled his FELA suit in state court. 502 U.S. at 199. The state trial court dismissed Hilton's complaint on the ground that "FELA does not authorize an action for money damages against an agency of the State, even if suit is maintained in a state forum." *Id.* at 200.

In holding that FELA does authorize causes of action against the States in their courts and in rejecting the argument that the *Welch* decision was controlling, this Court stated in *Hilton*:

Welch is not controlling here. The characterization of Welch is inaccurate because the most vital consideration of our decision today, which is that to confer immunity from state-court suit would strip all FELA and Jones Act protection from workers employed by the States, was not addressed or at all discussed in the Welch decision. Indeed, that omission can best be explained by the assumption, made express in the concurring opinion of Justice WHITE, that the Jones Act (and so to FELA by its terms) extends to the States. This coverage, and the jurisdiction of state courts to entertain a suit free from Eleventh Amendment constraints, is a plausible explanation for the absence in Welch of any discussion of the practical adverse effects of overruling that portion of *Parden* which pertained only to the Eleventh Amendment, since continued state-court jurisdiction made those effects minimal.

502 U.S. at 204. "... [A]s we have stated on many occasions, 'the

Eleventh Amendment does not apply in state courts.' [Citations omitted.]" *Id.* at 204-205.

Conferring immunity on Maine from suits in its courts would basically eliminate any private right of action by state employees against their employers under the FLSA. Justice White's reasoning in *Hilton* clearly applies to the Petitioners and their claims in this case. Their FLSA rights to overtime pay would be effectively stripped away if this Court affirms the Maine court's decision. Thus, allowing suit in state court serves to ameliorate the adverse effect of *Seminole Tribe's* holding forbidding a private right of action against the State in federal court.

In order to protect the State's treasury in this case, the Supreme Judicial Court of Maine has relied upon a faulty argument concerning the need for symmetry between federal and state courts, in its effort to extend the Eleventh Amendment's jurisdictional reach beyond Article III courts. As the Maine court stated:

If Congress cannot force the states to defend in federal court against claims by private individuals, it similarly cannot force the states to defend in their own courts against these same claims. In reaching this conclusion, we have found that the Eleventh Amendment and state sovereign immunity are analogous, to the extent that both protect the State from being forced by an act of Congress to defend against a federal cause of action brought by a private individual.

Alden, 715 A.2d at 174. However, the dissent in *Alden*, relying on *Hilton*, argued that the majority "accords symmetry undue weight." *Id.* at 177 (Dana, J., dissenting). Although the scope of Eleventh Amendment immunity is a valid consideration, it is not controlling. As stated in *Hilton*:

The resulting symmetry, making a State's liability or immunity, as the case may be, the same in both federal and state courts, has much to commend it.

... But symmetry is not an imperative that must override just expectations which themselves rest upon the predictability and order of stare decisis.

502 U.S. at 206.

In summary, the Eleventh Amendment does not define the scope of a State's common law sovereign immunity in its own courts. Although the Eleventh Amendment removes the Article III jurisdiction of federal courts to hear federal law claims against state governments, the Eleventh Amendment does not apply to the jurisdiction of state courts. And, therefore, the Petitioners have a constitutional congressionally enacted right, under the FLSA, 29 U.S.C. § 216 (b), to bring a cause of action against the Respondent in state court.

As discussed in the next section of this brief, the Supremacy Clause provides the crucial guidance for determining whether or not a federal cause of action can be heard in a state court.

III. Under the Supremacy Clause of the U.S. Constitution, state courts are required to hear claims arising under federal law, with very limited exceptions. The Supremacy Clause overrides the State of Maine's assertion of sovereign immunity and consequent Maine court refusals to entertain a cause of action by state employees to vindicate and enforce a right expressly conferred by the Fair Labor Standards Act. Affirming the decision below, barring an action brought by Maine state employees for violations of the FLSA, would effectively nullify that federal statute. It would disable the well-established principle that the laws of the United States are laws of the States and binding on *all* courts, with significant consequences for our system of government.

Article VI, Clause 2 of the United States Constitution, known as the "Supremacy Clause", provides, in pertinent part:

This Constitution, and the laws of the United States

which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

This Court has interpreted and applied this provision to prevent State courts from refusing to hear Federal claims, and also to override or "pre-empt" State laws, including common law, which thwarts the administration or execution of Federal law.

A. Under the Supremacy Clause, state courts of general jurisdiction cannot discriminate against and are therefore obligated to hear Federal claims, with very limited exceptions, especially (but not exclusively) if state courts of general jurisdiction would hear state law claims brought by the same or similarly situated plaintiffs against the State under some form of waiver of sovereign immunity.

Beginning in 1876, with *Claflin v. Houseman, Assignee*, 93 U.S. 130, 23 L.Ed. 833, followed by *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 32 S.Ct. 169 (1912), *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810 (1947), and, most recently, by *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430 (1990), this Court has repeatedly rejected efforts by state courts to dismiss federal law claims on the grounds that state courts have no obligation to hear federal claims, because of either a disagreement with the federal claim or a refusal to recognize the superior authority of its source.

In *Mondou*, this Court held that rights arising under a Federal statute enacted pursuant to the Commerce Clause may be enforced in state courts when their jurisdiction, as prescribed by local laws, is adequate to the occasion.

The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline

jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of [its constitutional power] adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be repeated accordingly in the laws of the state.

223 U.S. at 57.

In *Howlett*, this Court stated unequivocally the general principle that Federal law, as the "Supreme Law of the Land", is enforceable concurrently in state courts. "The Supremacy Clause ... charges state courts with a coordinate responsibility to enforce that [federal] law according to their regular modes of procedure." 396 U.S. at 367. There, a former high school student brought a § 1983 civil rights action in a Florida state court against a school board and officials for violation of his constitutional rights. That court dismissed the action against the school board on sovereign immunity grounds, and a state appellate court upheld that dismissal. This Court held that the state court's refusal to entertain such claims against a school district, when state courts would have allowed state law claims by the same plaintiff to be heard against the same defendants, violated the Supremacy Clause. This Court unanimously reversed and found that the state court was apparently evading federal law and discriminating against federal causes of action, because sovereign immunity would not have barred a claim under state law.

Respondents have offered no neutral or valid excuse for the [Florida] Circuit Court's refusal to hear § 1983 actions against state entities. The Circuit Court would have had jurisdiction if the defendant were an individual officer and the action was based on § 1983. It would also have had jurisdiction over the defendant school board if the action were based on established

state common law or statutory law. A state policy that permits actions against state agencies for the failure of their officials to adequately police a parking lot and for the negligence of such officers in arresting a person on a roadside, but yet declines jurisdiction over federal actions for constitutional violations by the same persons can be based only on the rationale that such persons should not be held liable for § 1983 violations in the courts of the State. That reason ... flatly violates the Supremacy Clause.

Id. at 380-81.

Howlett set forth the following principles and stated that they "are fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law." 496 U.S. at 372. *First*, state courts may not disassociate themselves from federal law because of policy or other disagreements with the law or because of a refusal to recognize the superior authority of the source of the law, the Congress and its authority under the Constitution. *Second*, state courts have a duty to exercise jurisdiction and may not deny a federal right in the absence of a "valid excuse", when the parties and controversy are properly before it. *Third*, state courts may not be obligated to entertain Federal claims, however, if they refuse jurisdiction because of a neutral state rule regarding the administration of the courts--lacking a court of competent jurisdiction, for example--or the application of a neutral procedural rule. In only three cases involving narrow non-discriminatory applications of state procedural or jurisdictional rules has this Court found "valid excuses" for state court refusals to entertain a federal claim. *Id.* at 374-75. Not one of those limited excuses or exceptions applies in the instant case. Moreover, even an apparently neutral rule, on its face, can be preempted if it severely curtails the Federal remedy.

Felder v. Casey, 487 U.S. 131 (1988).⁹

In addition, *Howlett* soundly rejected, as a violation of the Supremacy Clause, the Florida court's reasoning concerning the invocation of sovereign immunity. (The Eleventh Amendment was not an issue, because, as in *Hilton*, the action was in state court.) In its conclusion, this Court discussed the serious consequences of nullifying federal laws, as follows:

Respondents' argument that Congress did not intend to abrogate an immunity with an ancient common-law heritage [*i.e.* sovereign immunity] is the same argument, in slightly different dress, as the argument that we have already rejected that the States are free to redefine the federal cause of action. ... But as to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common-law heritage. If we were to uphold the immunity claim in this case, every State would have the same opportunity to extend the mantle of sovereign immunity to "persons" who would otherwise be subject to § 1983 liability. States would then be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the people.

496 U.S. at 383. In *Employees v. Missouri Public Health Dept.*, *supra*, Justice Marshall stated in a concurring opinion:

The common-law doctrine of sovereign immunity in its original form stood as an absolute bar to suit

⁹*Felder* stands for the proposition that where such a rule conflicts with the purpose or effect of a Federal remedial objective, it can be preempted. There, a Wisconsin "notice of claim" statute, requiring notice of a claim by the potential plaintiff to a state agency, a 120 day claim consideration period before filing a lawsuit, and a six month statute of limitations after the agency's decision, was preempted in a § 1983 case because of the rule's conflict with the purpose and effects of the Federal law.

against a State by one of its citizens, absent consent. But that doctrine was modified pro tanto in 1788 to the extent that the States relinquished their sovereignty to the Federal Government. At the time our Union was formed, the States, for the good of the whole, gave certain powers to Congress, including power to regulate commerce, and by so doing, they simultaneously subjected to congressional control that portion of their pre-existing common-law sovereignty which conflicted with those supreme powers given over to Congress. This is one of the essential lessons of the decision in *Parden v. Terminal R. Co.*, 377 U.S. 184, 192 (1964), ... Congress having validly exercised its power under the Commerce Clause to extend the protection of the FLSA to state employees such as petitioners, [citation omitted], the State may not defeat this suit by retreating behind its common-law shield of sovereign immunity.

411 U.S. at 288-89. That principle is the one which this Court is now asked to reaffirm.

Howlett is directly germane to the present case, as Maine seeks to nullify the enforcement of a Federal statute in its courts of general jurisdiction. Petitioner John Alden and other state employees filed this action in the Maine Superior Court, a court of general jurisdiction competent to hear this case. That court dismissed his action when the State of Maine invoked the doctrine of sovereign immunity. Yet, Maine has enacted several laws conferring on state employees the right to bring actions to recover damages from the State, thus waiving Maine's common-law judicial doctrine of sovereign immunity.¹⁰

¹⁰The State of Maine is subject to suit by its employees under the following statutes: Maine Wage Statute, 26 M.R.S.A. §§ 664, 670; Maine Whistle Blower Statute, 26 M.R.S.A. § 833; Maine Family Medical Leave Act, 26 M.R.S.A. § 884; Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.*; Maine Workers Compensation Act, 39-A M.R.S.A. § 101 *et seq.*

It does not matter that Maine has not enacted a law giving state employees the right to sue for overtime pay. *Howlett* was not predicated on a "similarity-of-claim" test, but focused more on the right of the plaintiff or persons similarly situated to bring a state claim damage action in state courts against the same or similarly situated government agencies or officials. *Howlett* specified two types of claims which could be brought in Florida's court, as examples, to illustrate the incongruity of Florida not allowing a § 1983 federal claim to go forward. Thus, there is no pre-requisite that there be an exactly parallel cause of action existing in state law for the same alleged violation as the federal violation; in fact, that may be highly unlikely given the determination by the Congress that a federal remedy was required (here, the FLSA protections for state employees).

The Arkansas Supreme Court recently addressed the very same issue before this Court. In *Jacoby v. Arkansas Department of Education*, 331 Ark. 508, 962 S.W. 2d 773 (1998), state employees filed a FLSA action against a state agency in state court. In a carefully analyzed and reasoned opinion, the Arkansas Supreme Court held, first, that the Eleventh Amendment does not provide the State of Arkansas with sovereign immunity from FLSA claims in state courts, relying heavily on *Hilton* and also *Howlett*, and, second, that under the Supremacy Clause the State is not immune from suit in state court for FLSA claims. The court concluded:

In sum, we have no doubt that the weight of authority favors the employees in this matter. The FLSA now remains to be enforced against state employers only in state courts and is viable only by virtue of the Supremacy Clause. Despite our conclusion, we do not view our decision today as supporting the concept that Congress has unbridled authority under the Commerce Clause to require state courts to enforce federal rights against a state government. But with the history of the FLSA and with the Court's clear message that the Eleventh Amendment is not pertinent to state immunity in state

courts, we can only conclude that the FLSA remains alive and well and that state-court enforcement against its own sovereign has not been foreclosed.

962 S.W.2d at 778.

Thus, in this case, the nullification by Maine's courts of the enforcement of FLSA's overtime protections through a lawsuit by Maine state employees directly violates the Supremacy Clause.

B. Under the Supremacy Clause, the Fair Labor Standards Act (FLSA) preempts any State law, both statutes and common law (including state sovereign immunity), which thwarts or stands as an obstacle to the judicial enforcement of the rights expressly guaranteed public employees by the FLSA.

The judicial concept of preemption derives from the Supremacy Clause. That clause invalidates state laws that "interfere with, or are contrary to the laws of the Congress, ..." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, 26 L.Ed. 23 (1824). Even when Congress has not explicitly or implicitly preempted state law in a regulatory statute, preemption may occur to the extent that state and federal law actually conflict. And when the mandates of federal law and state law are not consistent or otherwise conflict, the state law must yield. *Wisconsin Public Intervention v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476 (1991).

Furthermore, the doctrine applies equally to state common law and state statutory law. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1145 (1988).¹¹ Therefore, Maine's common law of sovereign immunity is considered a state law and may be preempted.

¹¹See *Cleveland v. Piper Aircraft Corporation*, 985 F.2d 1438 (10th Cir. 1993), *Gorton v. American Cyanamid Company*, 194 Wis.2d 203, 533 N.W.2d 746 (1995), and *Feldman v. Lederle Laboratories, etc.*, 125 N.J. 117, 592 A.2d 1176 (1991).

Under *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089 (1962), the relative importance of the state law is not relevant to the analysis of whether that law is preempted by federal law.

The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article VI, Clause 2. ... Thus our inquiry is directed toward whether there is a valid federal law, and if so, whether there is a conflict with state law.

369 U.S. at 666. See also *Ridgway v. Ridgway*, 454 U.S. 46, 54-55, 202 S.Ct. 49 (1962), and *Felder*, 487 U.S. at 138.

Federal law preempts state law when the objectives and purpose of the federal law are thwarted by state law. As this Court stated in *Brown v. Hotel Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 104 S.Ct. 3179 (1984):

Even in the absence of such express language [in a statute] or implied congressional intent to occupy the field, we may nevertheless find state law to be displaced to the extent that it actually conflicts with federal law. Such actual conflict between state and federal law exists ... when state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404 (1941).

Brown, 468 U.S. at 501. See also *Mortier*, 501 U.S. at 605. In *Hines*, this Court discussed the meaning of "obstacle" and "conflict", in preempting a Pennsylvania law regulating aliens:

This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: Conflict; contrary to; occupying the field; repugnance;

difference; irreconcilability; inconsistency; violation; curtailment; and interference. ... In the final analysis, there can be no crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.²⁰ [FN20. Cf. *Savage v. Jones*, 225 U.S. 501, 533, 32 S.Ct. 715, 726: 'For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished--if its operation within its chosen field must be frustrated and its provisions be refused their natural effect--the state law must yield to the regulation of Congress within the sphere of its delegated power.']

312 U.S. at 67-68.

In determining whether a state law stands as such an obstacle, this Court and other courts have developed formulations and methods of analysis. For example, in *Dewey v. R.J. Reynolds Co.*, 121 N.J. 69, 577 A.2d 1239 (1990), the New Jersey Supreme Court relied upon *Hines* and explained this doctrine of preemption by "actual conflict". It stated:

In contrast to express and implied preemption, the "actual conflict" analysis is "more an exercise of policy choices by a court than strict statutory construction" *Abbot v. American Cyanamid Co.*, 844 F.2d 1108 (4th cir. 1988). The test is straightforward: first, a court must consider the purposes of the federal law, and second, it must evaluate the effect of state law on those purposes. *Finberg v. Sullivan*, 634 F.2d 50, 63 (3rd Cir. 1980). ...

577 A.2d at 1247.

In cases where the application of state property laws and federal benefits laws conflict, this Court has adopted an "injury and non-recognition" formulation. In *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802 (1979), this Court stated:

The pertinent questions are whether the [state law] right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.

439 U.S. at 583. Just over two years later, this Court examined once again the conflict between California's community property law and a federal law regulating retirement benefits, relying upon the *Hisquierdo* formulation. Its decision in *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728 (1981), stated:

We conclude, therefore, that there is a conflict between the terms of the federal retirement statutes and the community property right asserted by appellee here. But "[a] mere conflict in words is not sufficient"; the question remains whether the "consequences [of that community property right] sufficiently injure the objectives of the federal program to require nonrecognition." *Hisquierdo*, 439 U.S., at 581-583. This inquiry, however, need be only a brief one, for it is manifest that the application of community property principles to military retired pay threatens grave harm to "clear and substantial federal interests." See *United States v. Yazell*, 382 U.S., at 352.

453 U.S. at 232.

There is an analogy between *Hisquierdo/McCarty* and the instant case. In those cases, the State of California sought through

its law to decide how retirement benefits would be apportioned to spouses, while the U.S. Government followed different formulas, apparently to maintain employee morale in one case and to replenish a retirement fund in the other case. Here, the State of Maine's interest in this case, the reason for invoking sovereign immunity, is to *not* pay out additional funds from its treasury to its workers, reserving those funds for other purposes. On the other hand, it is the objective of the FLSA's overtime provisions to require that public agencies, as well as most private employers, pay their employees additional pay if they work over a certain number of hours, in order to promote other objectives, such as fairness and an incentive to hire more workers.

Under the above "actual conflict analysis" formulations, the Maine court's action is preempted by the Supremacy Clause. Clearly, recognition of Maine's sovereign immunity threatens grave harm to the clear and substantial federal interests set forth in the FLSA. And the consequences of Maine's effort to not pay additional wages sufficiently injures the objectives of the FLSA, as to require nonrecognition by this Court. Clearly, Maine's and any other State's invocation of sovereign immunity for the purpose of not paying funds owed to their workers under federal law has the effect of abrogating and nullifying the remedy available to those workers under the FLSA, because state court is the only forum now available to vindicate that right after *Seminole Tribe* (except for sporadic Labor Department enforcement actions, discussed below).

In summary, Maine's action stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Congress, first, in enacting the FLSA protections and the remedies to enforce them and, second, in extending those rights to public workers through the 1966 and 1974 amendments. Hence, this Court should find that Maine's common law doctrine of sovereign immunity is preempted. Affirming the Maine's Supreme Judicial Court's decision in this case would elevate Maine's interest in not paying out funds from its treasury over the federal interest in fair treatment of public employees and also other objectives, which would be a clear abrogation of the Supremacy Clause in the name

of state sovereignty.

C. Affirmance of the lower court's decision in this case would have far-reaching consequences throughout the United States. It would result in inconsistent and disparate enforcement of the FLSA by state governments, effectively nullifying the protections and remedies available to state government employees in those States, such as Maine, which have invoked or could invoke sovereign immunity to bar employee lawsuits. It could also negatively impact other federal regulatory statutes applicable to and enforceable against the States.

In *Jacoby, supra*, the Arkansas Supreme Court addressed the issue of nationwide uniformity:

There is, of course, a uniformity consideration inherent in the principle of supreme law of the land. If the matter is left to the individual states to determine whether state sovereign immunity offers state employers sufficient protection, the result may well be a patchwork quilt of FLSA enforcement with some state courts permitting FLSA claims against state employers and other state courts declining to do so.

962 S.W.2d at 777. In addition to Arkansas, appellate courts in Iowa, Maryland, New Mexico, and New York have relied on *Hilton* and the Supremacy Clause and have ruled that the Eleventh Amendment is inapplicable to state court actions under the FLSA.¹² On the other hand, in addition to Maine, state courts in New Jersey, Wisconsin, and Ohio have expanded *Seminole Tribe* and the

¹²*Raper v. State of Iowa*, No. CL-678918 (District Court for Polk County, October 23, 1997), *Bunch v. Robinson*, 122 Md. App. 437, 712 A.2d 585, 595, (Md. Ct. Spec. App., 1998), and *Whittington v. State of New Mexico Dept. Of Public Safety*, Docket No. 19,065 (N.M. Ct. App., September 3, 1998).

Eleventh Amendment to apply to lawsuits by public employees under the FLSA, barring the lawsuits on sovereign immunity grounds.¹³ Disparate enforcement has already become a reality.

Precluding judicial enforcement of public employees' rights under the FLSA, whenever a state government invokes immunity, would effectively nullify those rights in that State, notwithstanding the authority of the U.S. Department of Labor to investigate for violations and to bring suit under the concurrent jurisdiction provided in 29 U.S.C. § 216. Any assertions that the Department of Labor could take over the responsibility for bringing all of these lawsuits against States, which are or would be brought by affected public employees, strain credibility and are completely unfounded, due to serious resource constraints. In fact, in 1971, when a majority of state and local employees were not covered by the FLSA, in *Employees v. Missouri Public Health Department, supra*, the Solicitor General argued in an *amicus* brief that less than 4% of the employing establishments then covered by the FLSA could be investigated by the Labor Department. 411 U.S. at 287. Clearly, the Wage and Hour Division of the Labor Department is not positioned to take over investigative and enforcement responsibilities for all alleged violations by state governments, as well as private sector enterprises, of the wage and hour provisions of the FLSA, because of clearly inadequate resources for that purpose.

Allowing some states to effectively bar such lawsuits, in order to escape the FLSA wage and overtime pay provisions, could have far-reaching and highly undesirable consequences for the supremacy of other Federal laws. Such a decision could create an insurmountable obstacle for individuals in an uncertain number of States (invoking sovereign immunity) to vindicate their Federal

¹³*Allen v. Fauver*, No. ESX-L-3302-94 (N.J. Super. Ct., February 17, 1998), on appeal to N.J. Sup. Ct. Law Division, *Keller v. Dailey*, No. 97A-PEOS-658 1997 WL 781897 (Ohio App. 10 Dist., December 16, 1997), and *German v. Wisconsin Dep't of Transportation*, No. 96-CV-1261 (Wis. Ci. Ct., March 8, 1997).

statutory rights, arising from any regulatory law passed under any of Congress's Article I powers, if such a law provides for equitable or monetary enforcement actions against the State. Hence, any other federal laws applicable to state governments could effectively be nullified in such States because of the absence of state judicial enforcement through private causes of action, whenever sovereign immunity is invoked. It is inconceivable that the uniformity of federal law, and thus the full force of the Supremacy Clause, could long survive if this Court affirms the Maine court's decision.

CONCLUSION

For the foregoing reasons, *amicus curiae* National Association of Police Organizations urges the Court to rule, first, that the FLSA divested the States of some of their sovereign powers under the Tenth Amendment; second, that the Eleventh Amendment does not apply and therefore does not bar actions filed by state employees in state court to vindicate their rights to overtime pay under the Fair Labor Standards Act; third, that the Supremacy Clause of the Constitution requires state courts to hear such FLSA cases; and, fourth, that the Supremacy Clause preempts invocations of sovereign immunity by a state, where they would pose a serious obstacle to the execution and administration of the FLSA. Therefore, *amicus curiae* respectfully requests that the Court reverse the judgment of the Maine Supreme Judicial Court.

Respectfully submitted this sixth day of January 1999.

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JAN 7 1999

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

JOHN H. ALDEN, et al.,

Petitioners,

—v.—

STATE OF MAINE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT
FOR THE STATE OF MAINE

**BRIEF FOR THE ASSOCIATION OF AMERICAN
PUBLISHERS, INC., THE AMERICAN SOCIETY
OF JOURNALISTS AND AUTHORS, INC.,
THE AMERICAN SOCIETY OF MEDIA
PHOTOGRAPHERS, INC., THE ASSOCIATION
OF AMERICAN UNIVERSITY PRESSES, INC.,
THE AUTHORS GUILD, INC., COPYRIGHT
CLEARANCE CENTER, INC., NATIONAL MUSIC
PUBLISHERS ASSOCIATION, INC., AND THE
SOFTWARE PUBLISHERS ASSOCIATION AS
AMICI CURIAE SUPPORTING PETITIONERS**

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QUESTION PRESENTED

Where Congress creates a cause of action pursuant to its Article I powers and entrusts its enforcement to state courts, may states defending against such actions in state courts interpose a defense of sovereign immunity, notwithstanding the Supremacy Clause of the United States Constitution?

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AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE¹

Amici, who file this brief with the consent of the parties, represent or license thousands of authors, publishers, and consumers of books, software, educational materials, and musical compositions who would have no meaningful protection from infringement by states and state entities if the claims of some states to sovereign immunity from suits under federal law in both federal and state courts were upheld.

Because of the extensive use state governments make of copyrighted materials — in state colleges and universities, in elementary and high school public education, in purchasing educational materials (software, books, sheet music) in some jurisdictions, in operating state university presses, in administering all the unpaid functions, programs and activities of a modern welfare and regulatory state — it is of vital importance to the creative community that copyright be fully protected against government infringement. *Amici* submit this brief, in a case involving no apparent copyright issue, because of their vital interest in ensuring that Congress *may*, if the need should arise, provide for effective copyright damage remedies against state infringement in state courts. Reversing the decision below appears essential to preserving Congress's power to do so.

In a recent decision, *Chavez v. Arte Publico Press*, 157 F.3d 282 (1998), vacated and rehearing *en banc* granted (10/1/1998), a Fifth Circuit panel held that despite Congress's

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

clear intent to abrogate state immunity from suit in federal court for copyright infringement, as reflected in the Copyright Remedies Clarification Act, Pub. L. 101-553, 104 Stat. 2749 (1990), that law exceeded congressional power. To minimize the impact of its holding and seemingly as a basis for its decision, the *Chavez* panel specifically noted that Congress could confer jurisdiction on state courts to hear copyright infringement suits. 157 F.3d at 291. *Alden v. Maine* calls that assumption into direct question.

Amici here have filed a friend-of-the-court brief in *Chavez* before the Fifth Circuit *en banc*, arguing (along with the United States and other *amici curiae*) that subjecting states to copyright infringement suits in federal court does not violate the Eleventh Amendment, *first*, because legislation doing so is within Congress' power to enforce the Due Process Clause under Section 5 of the Fourteenth Amendment, and *second*, because the state's own repeated use of the benefits afforded by copyright law results in a waiver of Eleventh Amendment immunity under the doctrine of *Parden v. Terminal Railway of Alabama*, 377 U.S. 184 (1964). However, if the Fifth Circuit ultimately holds that Congress has no power to subject states to copyright infringement suits in federal courts, and if this Court were to affirm that decision, then *amici* and other copyright owners would have no remedy from unfettered state infringement of copyright — *unless* Congress has the power to subject states to infringement remedies in state courts.

The basic presuppositions of the rule of law would be threatened if the Eleventh Amendment blocked Congress from providing for infringement suits against state infringers in both state and federal courts: notwithstanding Congress's undoubted power to subject states to the copyright law as a formal matter, see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), *overruling National League of Cities v. Usery*, 426 U.S.

833 (1976), the courts would have deprived Congress of any power to enforce compliance with it and to vindicate the rights of those whose property states take by infringement. As this Court noted in *Marbury v. Madison*, 5 U.S. 137 (1803), "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," and it is "[o]ne of the first duties of government" to afford such protection. *Id.* at 163.

The same interests that have led the *amici* to argue for preservation of federal court jurisdiction over copyright suits in the Fifth Circuit in *Chavez* therefore lead them, anticipatorily but urgently, to support petitioners' position here. If a textually unmoored Eleventh Amendment jurisprudence were to strike down Congress's effort to provide for damage suits against state infringers in federal court, then *amici* would urge Congress to abandon its 200-year historic policy of granting federal courts exclusive jurisdiction over copyright cases and to entrust such cases to state courts. Their interest here is in leaving Congress with the power, granted by the Supremacy Clause, effectively to do so.

SUMMARY OF ARGUMENT

The Supremacy Clause and this Court's decision in *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991), control the result in this case. Under *Hilton*, where Congress intends to abrogate state sovereign immunity in a federal statute, the Supremacy Clause requires a state court to apply the statute against the state regardless of whether such immunity is asserted. *Hilton* is consistent with both the structure of our federal system and with this Court's precedents. On its face and as interpreted by this Court, the Supremacy Clause mandates that federal laws take precedence over state laws, including state doctrines of sovereign immunity.

The Eleventh Amendment does not override the Supremacy Clause with respect to sovereign immunity in state courts. The Amendment restricts only federal court jurisdiction, and says nothing about state courts. It did not adopt a general principle of universally effective sovereign immunity, as this Court's prior decisions demonstrate. Nothing in this Court's recent decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), altered the scope of this Court's prior Eleventh Amendment jurisprudence in this regard.

In any event, Maine's assertion of sovereign immunity in the petitioners' suit would result in the deprivation of petitioners' property (the compensation guaranteed by supreme substantive federal law) without due process of law. Accordingly, far from being beyond congressional power under the emanations or presuppositions of the Eleventh Amendment, the challenged provision of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, creating a cause of action in state court free of a sovereign immunity defense, is within not only Congress's power under the Commerce and Supremacy Clauses, but also its power under Section 5 of the Fourteenth Amendment to enforce the guarantee that no state shall deprive any person of property without due process of law.

ARGUMENT

I. THE SUPREMACY CLAUSE MAKES THE FLSA FULLY ENFORCEABLE IN MAINE'S COURTS, ASSERTIONS OF SOVEREIGN IMMUNITY NOTWITHSTANDING.

There is no doubt in this case that Congress has the authority to subject states to liability for violating the overtime provisions of the FLSA. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985). The only question is whether state courts are required to hear such suits: that is, given that the State of Maine has been held immune from such

a suit in federal court, may Congress provide for the state court adjudication of a claim Congress has the power to create?

A. *Hilton v. South Carolina* governs the result in this case.

This Court's decision in *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991), is directly applicable and controlling in this case. In *Hilton*, a South Carolina state employee sued a state-owned railroad in South Carolina court under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60. The trial court dismissed the suit for lack of a clear statement in FELA of Congress's intent to abrogate South Carolina's sovereign immunity. The South Carolina Supreme Court upheld the dismissal, citing this Court's recent decision in *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468 (1987), that the remedial scheme used in FELA did not abrogate states' Eleventh Amendment immunity in federal court. This Court reversed the decision of the South Carolina Supreme Court, holding, first, that the Eleventh Amendment did not apply to state court suits, see *Hilton*, 502 U.S. at 204-05; second, that under the applicable rules of statutory construction (including *stare decisis*), Congress intended to subject states to suit under FELA; and third, that the Supremacy Clause therefore made FELA "fully enforceable in state court," *id.* at 207.

Hilton is directly applicable to the case at bar. Maine, like South Carolina before it, has asserted that the FLSA does not override its sovereign immunity in state court; that defense is no more valid here than in *Hilton*. The Eleventh Amendment, as the *Hilton* Court held, does not apply to state courts. Furthermore, whereas the *Hilton* Court relied in part on the principle of *stare decisis* in holding that Congress has expressly sought to subject states to suit, here Congress's intent to subject the states to suit under the FLSA is unquestionable.

See *Mills v. Maine*, 118 F.3d 37, 42 (1st Cir. 1997) (citing cases). Therefore, under *Hilton*, the FLSA, like FELA, is "fully enforceable in state court," assertions of state sovereign immunity notwithstanding. *Hilton*, 502 U.S. at 207.

B. *Hilton* is consistent with the text of the Constitution and with this Court's precedents.

Hilton was not an anomalous decision, but rather was deeply rooted in both the Constitutional framework of federalism and in this Court's prior decisions.

In our federal system both the states and the national government retain some elements of sovereignty. The ultimate sovereignty, however, is held not by the states or the national government, but by the people. See U.S. Const. preamble ("We the People . . . do ordain and establish this Constitution for the United States of America."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819) ("The government proceeds directly from the people . . ."); The Federalist No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed.) ("Here, in strictness, the people surrender nothing . . ."). The people have delegated some powers to the national government and some powers to their state governments. *McCulloch*, 17 U.S. (4 Wheat.) at 410. While the people have decreed through the Eleventh Amendment that, in some circumstances, states are not subject to suit in federal courts, they have also decreed that the Constitution and all laws passed pursuant to it are "the supreme Law of the Land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.²

² The Supremacy Clause reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . , shall be the supreme Law of the

This Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), demonstrates the limits of state sovereign immunity. Given the fact that "[i]n this Nation each sovereign governs only with the consent of the governed," *id.* at 426, a state's desire to immunize itself from suit may be restricted by the decisions of the people of other jurisdictions. The *Hall* Court held that there was no constitutional bar based on Nevada's sovereign immunity that would prevent California's subjecting Nevada to a tort suit in California's courts. "The people of Nevada have consented to a system in which their State is subject only to limited liability in tort. But the people of California, who have had no voice in Nevada's decision, have adopted a different system. Each of these decisions is equally entitled to our respect." *Id.* The people of the United States have adopted a different system with respect to the FLSA than the people of Maine. And here, unlike in *Hall*, the decisions are *not* equally entitled to the Court's respect. The Supremacy Clause demands that the decision of the people of the United States takes precedence over that of the people of Maine. Neither Maine, nor any other state, can reject the decision of supreme federal law.

Since Maine's courts must apply federal law, they must subject the state to suit under the FLSA as that law requires. It is beyond cavil that state courts have the power to decide questions under federal law generally. See *Palmore v. United States*, 411 U.S. 389, 402 (1973); *Testa v. Katt*, 330 U.S. 386, 390-91 (1947); *Mondou v. New York, New Haven & Hartford R.R.*, 223 U.S. 1, 56 (1912); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 342 (1816). Indeed, state courts have the

Land; and the Judges in every State shall be bound thereby, *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*" (Emphasis added.)

obligation to enforce federal law. See *Howlett v. Rose*, 496 U.S. 356, 370 (1990) ("[O]ur cases confirm that state courts have the coordinate authority and consequent responsibility to enforce the Supreme Law of the Land."). And Congress has the authority to create federal causes of action that the states will enforce. See *New York v. United States*, 505 U.S. 144, 178 (1992) (referring to "the well established power of Congress to pass laws enforceable in state courts."). Anything less would be inconsistent with the Supremacy Clause. See *Printz v. United States*, ___ U.S. ___, 117 S. Ct. 2365, 2381 (1997); *New York*, 505 U.S. at 178.

Under *Howlett v. Rose*, Maine's courts cannot refuse to apply the FLSA against the state, even if Maine does not consent to suit. In *Howlett*, a Florida student sued his local school board under 42 U.S.C. § 1983 for violating his civil rights during a search of his car on school premises. This Court held that although the state itself was not subject to suit under § 1983, due to a lack of proof of Congressional intent to that effect, see *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989), Florida could not immunize state agencies such as school boards from such suits in state court. *Howlett* detailed three corollaries of the Supremacy Clause that govern when a state court must apply federal law against a state. First, "[a] state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a 'valid excuse.'" *Howlett*, 496 U.S. at 369 (quoting *Douglas v. New York, New Haven & Hartford R.R.*, 279 U.S. 377, 387-88 (1929)).

Second, "[a]n excuse that is inconsistent with or violates federal law is not a valid excuse: the Supremacy Clause forbids state courts to dissociate themselves from federal law because of . . . a refusal to recognize the superior authority of its source." *Id.* at 371. The refusal of the Maine Supreme Judicial

Court to apply the FLSA against the state was just such a refusal to recognize the national government's superior authority, since its decision was clearly inconsistent with the FLSA's provision that an employer includes any "public agency." See 29 U.S.C. § 203(d).

The third corollary from *Howlett* is that the Court must proceed with caution when a state court refuses jurisdiction "because of a neutral state rule regarding the administration of the courts." *Id.* at 371. To be sure, Congress cannot require a state to "create a court competent to hear the case in which the federal claim is presented." *Id.*; see also *Brown v. Gerdes*, 321 U.S. 178, 190 (1944) (Frankfurter, J., concurring) ("Congress may avail itself of state courts for the enforcement of federal rights, but it must take the state courts as it finds them . . ."). But the mere fact that a state restriction on state courts is termed "jurisdictional" does not make it a legitimate excuse not to enforce federal law. *Howlett*, 496 U.S. at 381; see also *id.* at 382 ("The force of the Supremacy Clause is not so weak that it can be evaded by mere mention of the word 'jurisdiction.'") At the very least, states cannot refuse to hear an action solely because it is based on federal law.³ Here, as in *Howlett*, Maine

³ *Howlett* in fact went further, holding that a state court could not add immunities or defenses beyond those provided by the federal law. As noted above, the only reason that a state can escape liability in state court from § 1983 actions is because this Court has held that states were not *intended* by Congress to be sued under the statute. See *Will*, 491 U.S. at 64. "If the [Florida] District Court of Appeal meant to hold that governmental entities subject to [federal law] liability enjoy an immunity over and above those already provided in [the federal law], that holding directly violates federal law." *Howlett*, 496 U.S.

has established courts that hear "state law actions" against state defendants for the withholding of just compensation. Maine's refusal, therefore, to allow federal law actions under the FLSA against state defendants is, as was the similar refusal in *Howlett*, a "violat[ion of] the Supremacy Clause." *Id.* at 375. State courts must apply federal law to the states unless a constitutional or other legitimate doctrine bars such enforcement.

This Court's decisions in *Hilton*, *Hall*, and *Howlett* thus decisively reject the notion that, as the court below held, state sovereign immunity has been incorporated into the Constitution, either in the Eleventh Amendment or elsewhere, in such a way as to bar suits against states under federal laws in their own courts. The idea emerging instead from this Court's precedents and from the structure of the federal system is that state sovereign immunity is a creation of state law, enforceable only as permitted by the Supremacy Clause, and not a timeless command that trumps federal substantive law or prevents its enforcement. *See Hall*, 440 U.S. at 426 (finding that no federal rule implicit in the Constitution requires adherence to state sovereign immunity doctrine as it existed when the Constitution was adopted); *Howlett*, 496 U.S. at 383 ("[I]ndividual States may not exempt . . . persons from federal liability by relying on their own common law heritage. . . . States would then be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the People.").

Under the Supremacy Clause, no state law can override a federal statute passed pursuant to the Constitution. Neither a state statute, nor the common law, nor even the state's

at 375; *see also id.* at 379-80 (Florida court cannot reject § 1983 claim when it adjudicates other claims against state entities, even if "for substantive policy reasons" it does not hear all such claims).

constitution can have such an effect. It does not matter how important the inconsistent law in question might be to the state. "[T]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law," for "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

States may, of course, waive their sovereign immunity and consent, via statute or other legal device, to be sued in their own courts. *See Seminole*, 517 U.S. at 65 (citing *Parden v. Terminal Ry. of Ala.*, 377 U.S. 184 (1964)). And since under the Supremacy Clause a federal statute has the same effect in state court as state law (including state constitutional law), there is no reason why such a statute could not abrogate a state's power to assert immunity in its own courts just as a state statute or constitutional amendment might. "Federal law is enforceable in state courts because the Federal Constitution and laws passed pursuant to it *are as much laws in the states as are laws passed by the state legislature.*" *Howlett*, 496 U.S. at 367 (emphasis added). "The two together form one system of jurisprudence, which constitutes the law of the land for the State" *Claflin v. Houseman*, 93 U.S. 130, 137 (1876). Obviously, given that the national and state governments are distinct, there is the potential for inconsistencies in such a system. That is what the Supremacy Clause resolves. Federal law is supreme over inconsistent state law, including state laws creating sovereign immunity.

Of course, to ensure that Congress truly intended to subject states to suit, such a statute must contain the necessary "clear statement" of Congress's intent to do so. *See Will*, 491 U.S. at 65 (holding that whenever Congress "intends to alter the 'usual constitutional balance between the States and the Federal

Government,' it must make its intention to do so 'unmistakably clear in the language of the statute'). But as noted above, there is no doubt here that Congress made the necessary clear statement. *Mills*, 118 F.3d at 42. Because Congress clearly intended to subject states to suit under the FLSA, the FLSA is just as much a part of state law as any state statute or constitution, and it abrogates state sovereign immunity in Maine's courts just as would a Maine statute passed to the same effect.

It matters not that Maine may object to being sued under a federal statute. A state cannot resist enforcing federal law in its courts simply because the law "is not in harmony with the policy of the State." *Mondou*, 223 U.S. at 57. This is true whether the perceived conflict is over the substantive law or over what the appropriate forum for a certain right is. See *Howlett*, 496 U.S. at 375; see also *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980) (quoting *McLaughlin v. Tilendis*, 398 F.2d 287, 290 (7th Cir. 1968)) ("A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced."). As long as Congress has the authority to subject states to liability in a certain area, and makes its intent to do so clear in the language of the statute, "the Supremacy Clause makes that statute the law in every State, fully enforceable in state court." *Hilton*, 502 U.S. at 207.

Finally, *Hilton* and *Howlett* are not inconsistent with decisions holding that Congress cannot command state legislatures or executive officers to enforce a federal regulatory scheme. This Court has specifically limited its holdings in such cases to lawmakers and executive officers, noting that state judges are bound by the Supremacy Clause to apply

federal law. See *Printz*, 117 S. Ct. at 2371 ("It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time"); *New York v. United States*, 505 U.S. 144, 178 (1992) ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause"); see also *Printz*, 117 S. Ct. at 2381 (noting that *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982), "required state administrative agencies to apply federal law while acting in a judicial capacity").

This Court should therefore hold that Maine cannot assert a defense of sovereign immunity to enforcement of the FLSA.

II. THE ELEVENTH AMENDMENT DOES NOT APPLY TO SUITS AGAINST STATES IN STATE COURTS.

The court below failed to even consider the Supremacy Clause, see *Alden v. State*, 715 A.2d 172, 177 (Me. 1998) (Dana, J., dissenting), basing its decision instead entirely on the Eleventh Amendment. As even that court admitted, however, "the Eleventh Amendment is not directly applicable to state courts." *Id.* at 174 (quoting *Moody v. Commissioner, Dep't of Human Servs.*, 661 A.2d 156, 158 n.3 (Me. 1995)). The holding below that the Eleventh Amendment reflects a broad principle of reserved states' rights that leaves Congress as powerless to abrogate state sovereign immunity in state courts as in federal courts, and the conclusion that to hold otherwise would "effectively vitiate the Eleventh Amendment," *id.* at 174-75, are insupportable.

A. The Eleventh Amendment restricts only federal judicial power.

This Court has repeatedly held that the Eleventh Amendment has no application to state courts, and has never adopted the principle of symmetry between state sovereign immunity in federal and state courts that the court below viewed as controlling.⁴ The Eleventh Amendment restricts only federal court jurisdiction under Article III, not state court jurisdiction. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Of course, it is true that this Court has stated that the Eleventh Amendment embodies a broader principle than its mere textual provisions. The Court has thus "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)). Applying this logic, the Court has held (without textual warrant) that suits by citizens of a state against their own state under federal question jurisdiction in a federal court have been held to be barred under the Amendment. See *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). But while there have been broad statements in dicta to the effect that the Amendment stands for the principle that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent," *id.*,

⁴ See *Alden*, 715 A.2d at 174. *Hilton* explicitly rejected such a theory. Although "not . . . inconsequential," the rule favoring symmetry can be overcome. *Hilton*, 502 U.S. at 206.

none of these statements control the result here or invalidate *Hilton* or purport to overwhelm the Supremacy Clause.⁵

As this Court noted in *Nevada v. Hall*, cases such as *Hans*, while "emphasiz[ing] the widespread acceptance of the view that a sovereign State is never amenable to suit without its consent," all concerned the limits of federal court jurisdiction, and do not answer questions relating to sovereign immunity in state courts. See *Hall*, 440 U.S. at 420-21. Instead, this Court has uniformly denied that the Eleventh Amendment provides any guidance on the question of whether a state can assert immunity from a federal action in state courts. "[A]s we have stated on many occasions, 'the Eleventh Amendment does not apply in state courts.'" *Hilton*, 502 U.S. 204-05; see also *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-64 (1989) ("[T]he Eleventh Amendment does not apply in state courts."); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980) ("No Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only '[t]he Judicial power of the United States.'"); *Hall*, 440 U.S. at 420-21. The only issue posed by the Eleventh Amendment is "the susceptibility of the States to suit before federal tribunals"; the Amendment does not provide for "the general immunity of the States from private suit." *Atascadero*

⁵ Respondent's best argument based on this Court's prior opinions are based on four words in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994): "The Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, *if the State permits*, in the State's own tribunals." (Emphasis added.) These four words of dicta are far too anorectic a basis to hold that *Hilton* and *Howlett* have been implicitly overruled.

State Hosp. v. Scanlon, 473 U.S. 234, 240 n.2 (1985) (quoting *Employees v. Missouri Dep't of Pub. Health & Welfare*, 411 U.S. 279, 293-94 (1983) (Marshall, J., concurring)). Consistent with this view, the federal courts have assumed, in the case of the FLSA, that a litigant barred by the Eleventh Amendment in federal court could nevertheless sue in state court. See *Aaron v. Kansas*, 115 F.3d 813, 817 (10th Cir. 1997); *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996). Indeed, this point is so obvious that this Court has stated that "[i]t denigrates the judges who serve on the state courts" to suggest that they will fail to grasp it. *Atascadero*, 473 U.S. at 240 n.2.

Not every statement in a judicial opinion is a measured demarcation of constitutional limits. For example, this Court declared in *Hans* that "[i]t may be accepted as a point of departure unquestioned . . . that neither a State nor the United States can be sued as defendant in any court in this country without their consent" except under the Supreme Court's original jurisdiction. 134 U.S. at 17 (quoting *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883)). Yet this Court has several times since allowed unwilling states to be sued in various tribunals, all without overruling *Hans*. See, e.g., *California & State Lands Comm'n v. Deep Sea Research*, ___ U.S. ___, 118 S. Ct. 1464 (1998) (in rem admiralty case); *Hilton*, 502 U.S. 197 (allowing suit under federal law in state court); *Hall*, 440 U.S. 410 (allowing suit in another state's courts); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (immunity abrogated under Fourteenth Amendment); *Parden v. Terminal Ry. of Ala.*, 377 U.S. 184 (1964) (constructive waiver). And while it may generally be true that, as this Court recently stated, the Eleventh Amendment "serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,'" *Seminole*, 517 U.S. at 58 (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)), the numerous cases

subjecting states to suit indicate that indignity avoidance is not the paramount concern of our federal system.

If statements such as those cited above were given literal effect, similar statements that the Fourteenth Amendment "operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment," *Seminole*, 517 U.S. at 65-66, could be interpreted as granting unlimited power to the federal government. In fact, neither principle is without limits, as this Court has consistently recognized. See *City of Boerne v. Flores*, 521 U.S. 507 (1997). The limits of state sovereign immunity lie in the text of the Supremacy Clause and in this Court's actual holdings, such as those in *Hilton*, *Howlett*, and *Hall*, not in the dicta used in those or other cases.

B. *Seminole* did not hold the Eleventh Amendment effective in state courts or superior to the Supremacy Clause.

Nothing in *Seminole* overruled this Court's prior holding in *Hilton* subjecting states "fully" to suit in state court under federal law. Although this Court stated in *Seminole*, in dicta, that the Eleventh Amendment derived from the "background principle" of state sovereign immunity, *Seminole*, 517 U.S. at 72, *Seminole*'s holding was consistently limited to "prohibit[ing] Congress from making the State of Florida capable of being sued in federal court." *Id.* at 76; see also *id.* at 54 ("For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'") (citing *Hans*, 134 U.S. at 15); *id.* at 63 ("It [is] well established . . . that the Eleventh Amendment [stands] for the constitutional principle that state sovereign immunity limit[s] the federal courts' jurisdiction under Article III."); *id.* at 64 ("The Eleventh Amendment restricts the judicial

power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."); *id.* at 72 (referring to statements of Framers "the most natural reading of which would preclude all federal jurisdiction over an unconsenting State").

III. BECAUSE MAINE'S REFUSAL TO AWARD IN STATE COURT THE WAGES CONCEDEDLY REQUIRED BY FEDERAL LAW WOULD VIOLATE THE DUE PROCESS CLAUSE, CONGRESS MAY CONSTITUTIONALLY SUBJECT MAINE TO SUIT IN STATE COURT FOR THOSE WAGES FREE OF ANY SOVEREIGN IMMUNITY DEFENSE.

Maine's assertion of sovereign immunity as a defense to Alden's FLSA claim has resulted in a deprivation of Alden's property without due process of law, in violation of the Fourteenth Amendment.

This Court has long held that where a state deprives an individual of property in violation of federal law, and then fails to offer a sufficient state court remedy, such a deprivation violates the guarantees of the Fourteenth Amendment. For example, "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is . . . itself in contravention of the Fourteenth Amendment," the sovereign immunity States traditionally enjoy in their own courts notwithstanding." *Reich v. Collins*, 513 U.S. 106, 109-10 (1994) (quoting *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930)); see also *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990) (collection of tax without state law remedy is violation of Fourteenth Amendment); *Ward v. Board of County Comm'rs*, 253 U.S. 17, 24 (1920) (same).

Reich v. Collins involved a taxpayer who sought recovery of income taxes collected by the State of Georgia in violation of federal law. In *Reich*, as here (and as would be the case if Congress were eventually forced by adverse decision in *Chavez* to grant state courts jurisdiction over copyright infringement actions against state infringers), the claimant was barred from federal court because of the state's Eleventh Amendment defense. See *Reich*, 513 U.S. at 110. This Court unanimously reversed the decision of the Georgia Supreme Court and remanded the case for "meaningful" retrospective relief, notwithstanding any assertion of state sovereign immunity. See *id.* at 109-10, 114. Sovereign immunity is likewise no bar to an action for compensation for a taking under the Fifth Amendment. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987).

Maine's refusal to pay for overtime required by federal law is not distinguishable from Georgia's refusal to pay a tax refund required by federal law. In either case, a state has wrongfully deprived a plaintiff of property without remedy, and therefore without due process. Depriving persons of any effective remedy whatever for undoubted violations of law is the most serious kind of violation of the rule of law, as the Court's unanimous ruling in *Reich v. Collins* makes clear. See also *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982) ("If the Constitution provided no protection against such unbridled authority, all property rights would exist only at the whim of the sovereign").

While *Reich* and *First English Evangelical Lutheran Church* appear to provide authority for insisting that Maine's courts create for Alden and those similarly situated a cause of action and a remedy, none is needed here. Under the circumstances, the evident due process violation created by

recognition of state sovereign immunity in state court from the petitioners' suit for recovery of their withheld overtime payments makes plain that the remedy chosen by Congress is within Congress's power under section 5 of the Fourteenth Amendment (the "Enforcement Clause"), which gives Congress the power to enforce, by "appropriate legislation," the prohibition against state deprivation of property without due process of law. Where, as in the FLSA, such legislation does not attempt to expand the scope of any substantive constitutional rule or otherwise encroach on state authority, but only ensures the very judicial remedy, in the state's own courts, that the Constitution requires (namely restoration of the property interest of which the state has wrongfully and without due process deprived the plaintiff), it is "appropriate" and well within congressional power. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

CONCLUSION

The judgment of the Maine Supreme Judicial Court should be reversed.

Respectfully Submitted.

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Supreme Court, U. S.

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In the
Supreme Court of the United States
October Term, 1998

JOHN H. ALDEN, ET AL.,
Petitioners,
v.
STATE OF MAINE,
Respondent.

On Writ of Certiorari to the
Supreme Judicial Court of Maine

**BRIEF AMICUS CURIAE OF PACIFIC
LEGAL FOUNDATION IN SUPPORT
OF RESPONDENT STATE OF MAINE**

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QUESTION PRESENTED

Does Congress have the authority under the Commerce Clause to create a state fiscal obligation, such that a private litigant may sue the state for damages based upon not meeting this federal obligation, and abrogate state sovereign immunity from suit in state court in order to enforce this obligation?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Respondent, the State of Maine. Written consent for amicus participation in this case was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America.¹ Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated in cases concerning the Tenth Amendment, the Eleventh Amendment, the Commerce Clause, and other constitutional limitations on federal power. For example, PLF participated as amicus curiae before this Court in *Printz v. United States*, 117 S. Ct. 2365 (1997), *United States v. Lopez*, 514 U.S. 549 (1995), and *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989). PLF has also directly represented parties in litigation raising federalism issues, such as *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997), and is involved as amicus curiae in the ongoing litigation in *Oklahoma v. United States*, 161 F.3d 1266 (10th Cir. 1998), *Pryor v. Reno*, 998 F. Supp. 1317 (M.D.

¹ Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Ala. 1998), and *Travis v. Reno*, 1998 WL 871038 (7th Cir. 1998), involving Tenth Amendment challenges to the Driver's Privacy Protection Act, 18 U.S.C. § 2721, *et seq.*

This case raises a significant and fundamental question of law about the extent of power the Constitution grants to Congress to establish rules for the operation of state governments. Amicus seeks to augment the arguments in the Respondent's brief regarding the proper understanding of the federalist system established by the Constitution. PLF believes its public policy perspective and litigation experience dealing with federalism and the Constitution's enumeration of powers will provide this Court with a broader policy viewpoint than that presented by the parties and believes its broader viewpoint will aid this Court in the resolution of this case.

STATEMENT OF THE CASE

A probation officer employed by the State of Maine brought suit against the state in federal court seeking overtime pay. The suit was based on the Fair Labor Standards Act (FLSA) 29 U.S.C. § 201, *et seq.*, a federal law enacted by Congress pursuant to its commerce power that, by its terms, applies to the states. During the pendency of the trial, this Court rendered its decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). That case held that Congress may not abrogate state immunity under the Eleventh Amendment for Commerce Clause enactments. *Id.* at 72. Consequently, the Petitioners' federal suit was dismissed for lack of jurisdiction. *Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997). The officer then brought suit in state court. The State of Maine asserted its sovereign immunity as a defense. The trial court dismissed the case on this basis, and the Supreme Judicial Court of Maine affirmed. *Alden v. Maine*, 715 A.2d 172 (1998). This Court granted a writ of certiorari to determine whether Maine's state courts have an obligation to enforce federal commerce legislation against the state itself, notwithstanding the principle of state sovereign immunity.

SUMMARY OF ARGUMENT

The Eleventh Amendment specifically refers to the judicial power of the United States. As a result, it cannot, by itself, fully resolve the federalism issues raised in this case. However, this Court has never interpreted the Eleventh Amendment by mechanically tracking the language of the Amendment itself. Instead, this Court has indicated that the Eleventh Amendment memorializes a fundamental principle of federalism. Under this view, the Eleventh Amendment did not create state sovereign immunity from whole cloth. Rather, notwithstanding *Chisholm v. Georgia*, 2 U.S. 419 (1793), state immunity from suit exists as an attribute of sovereignty independent of the Eleventh Amendment.

Thus, the real question in this case is not simply one of court jurisdiction, but of state sovereignty, and the limits placed on federal power by that sovereignty. The issue is: does Congress have the power to unilaterally abrogate state sovereign immunity? The only answer that adequately respects the Constitution's federalist structure is no. In this case, federal encroachment on state sovereignty is twofold: first, by mandating state compliance with federal law through this Court's decision in *Garcia v. San Antonio Metropolitan Transportation Authority*, 469 U.S. 528 (1985), and second, by forcing state courts to enforce federal law against the states themselves. Contrary to the argument of the Petitioners and the United States, this Court's resolution of the first does not necessarily dictate the result in the second. *Garcia* did not hold that Congress could enforce the FLSA by any means. This Court should resist expanding *Garcia*, and flatly reject *Garcia*'s reasoning that this Court has no role in keeping congressional enactments within constitutional bounds.

This Court should hold that the Constitution does not grant Congress the power to abrogate state sovereign immunity. Any other finding would be inconsistent with this Court's recent

federalism pronouncements, as well as result in a significant expansion of federal power under the Commerce Clause.

ARGUMENT

I

THE ELEVENTH AMENDMENT, BY ITSELF, DOES NOT RESOLVE THE ISSUE IN THIS CASE, THOUGH IT ESTABLISHES OUTER LIMITS ON FEDERAL POWER OVER THE STATES

The Eleventh Amendment states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment was passed following *Chisholm v. Georgia*, in which this Court held that it could exercise jurisdiction over an unconsenting defendant state at the behest of a private citizen of another state. *Chisholm*, 2 U.S. at 419. As pointed out in *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), the *Chisholm* decision "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." *Monaco*, 292 U.S. at 325. Though the text of this Amendment is straightforward, this Court has emphatically and repeatedly pointed out that the Eleventh Amendment implies something more than the plain meaning of its words. "We long have recognized that blind reliance upon the text of the Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of.'" *Seminole Tribe of Florida v. Florida*, 517 U.S. at 69 (citations omitted).

While the passage of the Eleventh Amendment obviated the need for this Court to overturn the *Chisholm* decision, this

Court has since viewed *Chisholm* as "discredited." *Seminole Tribe*, 517 U.S. at 68. That is, this Court has effectively overruled *Chisholm* by recognizing that sovereign immunity is a thing that exists regardless of the strictures contained in the Eleventh Amendment. A state's immunity from suit is not a federally-created right, but an attribute of sovereignty.

The suability of a state, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted.

Monaco, 292 U.S. at 327. An assertion of Eleventh Amendment immunity from suit is something more than arguing a mere formal limitation on the Article III jurisdiction of the federal courts. It is an assertion that the states stand in a special place by virtue of their sovereignty, and thus may not be sued in the absence of consent.

In The Federalist No. 81, Alexander Hamilton elaborated on the principle of state sovereign immunity. In attempting to allay the fears of anti-federalists that Article III, Section 2 (describing the federal judicial power), would allow states to be haled into federal court without their consent, he responded that state sovereign immunity was so fundamental that its expression was unnecessary under the proposed Constitution. As one of the drafters of our Constitution, his thoughts are worth repeating here:

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states.
... [T]here is no colour to pretend that the state

governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to compulsive force. *They confer no right of action independent of the sovereign will.*

Alexander Hamilton, *The Federalist* No. 81 (Garry Wills ed., 1982) at 414 (former emphasis in original, latter emphasis added).

In *Seminole Tribe*, this Court's most recent pronouncement on the Eleventh Amendment, this Court established that federal courts may not entertain suits against unconsenting states for alleged violations of federal Commerce Clause enactments. *Seminole Tribe*, 517 U.S. at 72. Viewed another way, this Court held that the Commerce Clause does not grant Congress the power to override the Eleventh Amendment's recognition of state sovereign immunity from suit in federal courts. *Id.*

In the Petitioners' federal case, there is little debate that the federal court's dismissal was proper under this Court's decision in *Seminole Tribe*. But unlike *Seminole Tribe*, the present case requires this Court to establish the scope of state sovereignty in the context of federal legislative power over *state* courts, rather than federal legislative power over *federal* courts. This question is of a different nature. The Eleventh Amendment literally governs "the judicial power of the United States"; therefore, the Amendment itself, and cases arising under it, are technically irrelevant in determining congressional power vis-a-vis the states and state courts. *But see, Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 210 (1991) (O'Connor, J., dissenting) (discussing Eleventh Amendment in case dealing with state court jurisdiction). Nonetheless, the Eleventh Amendment is pertinent in this case not so much for its text, but for its context in our federalist system. In short, the Eleventh

Amendment is instructive in determining the scope of state sovereignty protected by the Constitution.

There is no question that the State of Maine has withheld its consent to be sued in this suit brought by its citizens under the FLSA. The question is whether this lack of consent acts as an absolute bar to the suit, regardless of congressional intent to provide a private right of action for damages under its Commerce Clause enactments.² And though the Eleventh Amendment speaks only to the extent of federal judicial power, rather than federal legislative power, it suggests that the federal government itself lacks the power to override state sovereign immunity in any of its branches. The federalism sentiments which prompted Congress and the States to so strongly reject *Chisholm* as to adopt the Eleventh Amendment would be no less offended—or shocked—by the federal overreaching here. It could hardly have been contemplated that our courts would find a congressional power to abrogate a state's sovereign immunity in that state's own courts. This Court should remain faithful to

² In the private right of action provision of the FLSA, Congress states that "any employer" includes "a public agency." 29 U.S.C. § 216(b). Further, "public agency" is defined to include "the government of a State" or "any agency . . . of a State." 29 U.S.C. § 203(x). Federal Courts of Appeal determined that this was sufficient for finding congressional intent to abrogate sovereign immunity under the now-defunct rule in *Pennsylvania v. Union Gas*. *See, e.g., Reich v. State of New York*, 3 F.3d 581, 591 (2d Cir. 1993). *But see, American Federation of State, County & Municipal Employees v. Corrections Department of New Mexico*, 783 F. Supp. 1320, 1323 (D.N.M. 1992) (finding congressional intent to abrogate not sufficiently clear). Because a private right of action against the states requires abrogation of immunity in either federal or state court, it is reasonable to find an intent to abrogate in this language; otherwise, one must make the unreasonable inference that Congress was only providing a private right of action where states consent to suit. Thus, this Court must resolve the case on the constitutional issue, rather than on the basis of a "clear statement" rule. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991), and the cases there cited.

those federalism sentiments, and hold that Congress lacks the power under our federalist system to abrogate state sovereign immunity in state court.

II

RESPECT FOR FEDERALISM REQUIRES THIS COURT TO HOLD THAT CONGRESS LACKS THE POWER TO ABROGATE STATE SOVEREIGN IMMUNITY

In *Seminole Tribe*, this Court held that the principle of state sovereignty, of which state sovereign immunity is an attribute, is offended by congressional enactments that force states to submit to federal court jurisdiction. *Id.* at 67-68. It is difficult to imagine that state sovereignty is less offended by the present case, where a congressional enactment forces states to comply with federal dictates, and forces state courts to enforce a federal law against the states by abrogating state sovereign immunity.

Oddly, the root of the present litigation is this Court's decision in *Garcia v. San Antonio Metropolitan Transportation Authority*, which held that the FLSA could be applied to the states without violating the Commerce Clause or federalism. While the present case may not be the proper vehicle for squarely confronting *Garcia*, it does require the Court to reconsider the implications of *Garcia*.³

Prior to *Garcia*, the present case simply would not have arisen. Before *Garcia*, congressional exercises of the commerce

³ The Respondent's Brief in Opposition raised the issue that, should the Court take up the sovereign immunity question, it should reconsider *Garcia*. *Respondent's Brief in Opposition* at 17 n.8. Amicus Curiae National Association of Police Organizations rests its argument largely upon the holding in *Garcia*, *Brief of Amicus Curiae National Association of Police Organizations in Support of Petitioners* at 9-12, and the United States relies greatly on *Garcia* in finding in favor of a private right of action in this case. *See Brief for the United States* at 13-14.

power could not force states to conform to federal notions of how state governments should be operated. But that changed. *Garcia* determined that Congress could indeed require the states, in their capacities as employers, to meet federal employment standards such as those contained in the FLSA. *See Garcia*, 469 U.S. at 555-56. Congress' application of federal labor laws and other federal laws to the *states as states* created the circumstance wherein states could be haled into court by private citizens seeking to recover monetary damages. Thus, *Garcia* made it inevitable that the conflict in this case would arise.

Garcia is also implicated by the fact that, as pointed out by the Petitioners, the United States, and their amicus, the *Garcia* decision upholding the application of the FLSA to the states would be undermined if a private right of action was barred on the basis of state sovereign immunity.⁴ *See Brief for the United States* at 12-14. As a result, they argue that the Supremacy Clause dictates the result in this case: a finding that Congress may validly abrogate state sovereign immunity under the Commerce Clause to enforce the FLSA. That is, because this Court held in *Garcia* that the application of the FLSA to the states implicated no federalism concerns, the Supremacy Clause dictates that, following *Garcia*, the enforcement of the FLSA through the creation of a private right of action against the states in state courts similarly raises no federalism concerns. Because of *Garcia*, Petitioners apparently believe that the FLSA is simply the supreme law of the land.

⁴ Congress may provide other remedies besides a private right of action. In *Seminole Tribe*, this Court identified three methods of enforcing federal laws against the States: a suit by the federal government against the state, a suit brought against a state official under *Ex Parte Young*, or state consent to suit. *Seminole Tribe*, 517 U.S. at 71 n.14. In addition to a private right of action, the FLSA provides for enforcement actions by the Secretary of Labor against a State. *See* 29 U.S.C. §§ 216(b), (c), and 217.

But the Supremacy Clause does not require this Court to follow *Garcia* to that degree. That it would undermine *Garcia* if this Court were to hold that Congress may not create a private right of action against the states is an argument that is well-taken. But it ignores the counterargument that perhaps *Garcia* should be undermined, at least to that extent. The only alternative route presented by this case is to expand upon *Garcia* to a significant degree. *Garcia* found that Congress could create state fiscal obligations by requiring states to comply with the FLSA. But finding a congressional power under the Commerce Clause to unilaterally abrogate sovereign immunity is a *different* power than the considerable power already upheld in *Garcia*. The power to apply the law and the power to require enforcement by a particular means are not necessarily equal or concurrent. Thus, reliance upon the Supremacy Clause for resolving this case reaches too far. It only begs the issue, because the operation of the Supremacy Clause depends wholly upon a finding that the exercised power is, in the first instance, within Congress' grasp.

Though it is possible to resolve this case without disturbing *Garcia*'s ultimate determination that the FLSA may be applied to the states, it is not clear this Court can proceed without disturbing *Garcia*'s broad rationale. For example, this Court has already rejected the notion that Congress may employ any means to enforce a federal law, so long as its end is legitimately within its powers. In *New York v. United States*, this Court held that Congress may not regulate interstate radioactive waste by forcing the state legislative branch to legislate in a certain way or, alternatively, take title to waste generated within its borders. *New York v. United States*, 505 U.S. 144, 175-76 (1992). And in *Printz v. United States*, this Court held that the federal government may not conscript state executive officials into carrying out a federal regulatory program. *Printz*, 117 S. Ct. at 2384. These cases stand for the proposition that there exist some aspects of state independence and autonomy with which the federal government may not interfere.

However, the Petitioners argue that the matter at issue here, sovereign immunity, does not bear any constitutional weight in light of Congress' vast Commerce Clause powers, as defined by *Garcia*.⁵ *Garcia* discarded the test created in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that Congress may not regulate the "states as states," *see id.* at 854, largely on the basis that courts could not discern what properly fell into the sphere of "traditional government functions" or "matters that are indisputably 'attribute[s] of state sovereignty.'" *Garcia*, 469 U.S. at 548 (citations omitted). Although that argument may have had some merit with respect to transportation or water services (*see id.* at 542), it is certainly not the case with sovereign immunity. But *Garcia* seemed to reject completely the idea that courts "ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States." *Id.* at 548. Instead, *Garcia* announced:

[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the

⁵ Contrary to Petitioners' argument *Hilton* does not resolve this issue. Justice Kennedy's opinion repeatedly emphasized that the issue before the Court was "a pure question of statutory construction," not constitutional law. *Hilton*, 502 U.S. at 205. His opinion had this to say regarding state immunity in state court:

The resulting symmetry, making a State's liability or immunity, as the case may be, the same in both federal and state courts, has much to commend it. It also avoids the federalism-related concerns that arise when the National Government uses the state courts as the exclusive forum to permit recovery under a congressional statute. This is not an inconsequential argument. Symmetry in the law is more than esthetics. It is predictability and order.

Id. at 206.

Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

Id. at 554. This Court seemed to say that the only protection afforded to a state was the state's membership in the union, and its representation in the legislative branch of the federal government. In short, strict adherence to *Garcia* leaves states in no better position with respect to the federal government than a private citizen, whose remedy for defects in government policy lies only in the political arena.

But the states do "occupy a special position in our constitutional system," *id.* at 547, as recognized by this Court in *New York* and *Printz*. Here, there is no question that sovereign immunity is something this Court, and any court, can discern as an "underlying element[] of political sovereignty that [is] deemed essential to the States' 'separate and independent existence.'" *Garcia*, 469 U.S. at 548. To the extent that *Garcia* suggests that no attribute of sovereignty is "fundamental," *id.*, or beyond the power of this Court to protect, it should be overruled.

This Court has recognized the respect the federal government must pay toward the state courts and the application of state law principles within state courts under our federal system:

The Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States--independence in their legislative and independence in their judicial departments. [Federal] [s]upervision over either the legislative or judicial action of the States is in no case permissible

except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the States and, to that extent, a denial of its independence.

Erie R. Co. v. Tompkins, 304 U.S. 64, 78-79 (1938). Respect for the position of the states inheres in this Court's decisions, whether in the application of the *Erie* doctrine or in finding substantive limitations on federal power in *New York* and *Printz*. But the federalism-related implications of the present case go beyond these precedents. The federalism implications of this case are compounded, because the Petitioners are seeking to decimate an essential attribute that characterizes a state as a sovereign: sovereign immunity.

The United States downplays the federalism implications of this case by arguing that exclusive state jurisdiction over claims against the states "furthers the State's interest in playing a role in defining the contours of federal law and in integrating federal and state law into a single body of law governing the conduct of state officials." *Brief for the United States* at 12. The first error in this argument is that the State of Maine has already indicated that it has *no* interest in this role; therefore, there can be no furthering of it's interests by abrogating its immunity. The second is that this reasoning--that states will decide the meaning of federal law--fairly thwarts the very purpose of federal law: national uniformity. But finally, and most importantly, the United States concedes that finding a power to abrogate will blur the lines between state and federal law. Since federalism maintains separation between state and federal governments for the purpose of preserving individual freedom, *see generally, Gregory v. Ashcroft*, 501 U.S. at 458-59, "integrating" the two can hardly be characterized as a virtue. Thus, even though the United States tries to paint its argument in a positive light, they cannot ignore the broader implications of what they are asking. Finding a power to abrogate will lead to

even greater inroads into state sovereign interests--and individual liberty--than already exist under *Garcia*. This Court should resist taking such a step.

This Court should expressly disavow *Garcia*'s undue deference to trusting the political processes to protect state sovereignty. This Court has an affirmative role in protecting the independence of the states. As noted by Hamilton:

It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.

Alexander Hamilton, *The Federalist* No. 78 at 396. In particular, it is this Court's duty "to declare all acts contrary to the manifest tenor of the constitution void." *Id.* at 395. While, as stated above, this Court need not overrule *Garcia*'s holding that the FLSA may be applied to the states, this Court should expressly disavow its rationale to the extent that it suggests that there are no fundamental attributes of sovereignty which this Court cannot affirmatively protect from federal encroachment. State sovereign immunity is an attribute of state sovereignty that requires this Court's protection from congressional overreaching.

CONCLUSION

This Court's decision in *Garcia v. San Antonio Metropolitan Transportation Authority* upheld Congress' application of the Fair Labor Standards Act to state governments. In this case, the Petitioners and the United States are asking this Court to go further than *Garcia*, and hold that Congress has the authority under the Commerce Clause to override state sovereign immunity by allowing the FLSA to be

enforced by a private right of action against the states in state courts. But this is contrary to fundamental notions of federalism and state sovereign immunity.

In the decision below, the Supreme Judicial Court of Maine held that Congress lacked this power. This Court should affirm the decision of the Maine Court and hold that the constitutional principle of federalism denies Congress the power to abrogate state sovereign immunity in state courts.

DATED: February, 1999.

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10
No. 98-436

Supreme Court, U. S.

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In the
Supreme Court of the United States
October Term, 1998

John H. Alden, et al.,

Petitioners,

v.

State of Maine

Respondent.

On Writ of Certiorari to the Supreme Court of Maine

Brief of Amicus Curiae in Support of Respondent

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QUESTION PRESENTED

May a state employee sue the state under the Fair Labor Standards Act in a state court?

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INTEREST OF AMICUS CURIAE¹

Home School Legal Defense Association is a membership organization representing over 60,000 families and approximately 200,000 children. HSLDA's advocacy of its members' interest frequently involves litigation concerning a family's constitutional rights. It is the position of the organization that the interpretation of the Constitution according to the original intent of the founders is the only safe basis for the preservation of limited government and all rights including those important to our association. Accordingly, HSLDA has begun the Original Intent Project to systematically research and advocate constitutional interpretation according to the principle of original intent.

SUMMARY OF ARGUMENT

The Fair Labor Standards Act cannot be applied to state governments for two separate reasons that are made clear upon an examination of the original intent of the Constitution.

First, the historical record explicitly demonstrates that the founders intended to preserve the doctrine of sovereign immunity in the original text of the Constitution. That doctrine was strengthened by the adoption of the Tenth Amendment. And the loophole to this principle that was created by the

¹ This brief was not authored in whole or in part by counsel for any party. It has been funded in its entirety by the *amicus curiae*. See Sup. Ct. Rule 37.6

The *amicus curiae* requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties have been submitted for filing to the Clerk of Court. See Sup. Ct. Rule No. 37.3(a).

decision of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), was immediately and decisively closed by the Eleventh Amendment.

The one valid exception to this principle of state sovereign immunity under the constitution—the Fourteenth Amendment—is not applicable to this case since the FLSA is in no way justified as an exercise of congressional power under that amendment.

Second, the FLSA cannot be applied to state government since the power of Congress to regulate interstate commerce cannot be constitutionally applied to the regulation of the conditions of employment of state government officials or workers.

Although in theory, the plaintiffs can argue that the issue presented in this case was not addressed in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 134 L. Ed. 2d 252 (1996), the founders did not leave the question open for the adoption of a new standard. The historical record forecloses any suggestion that states may be sued in state courts by state employees for supposed violations of a congressional labor law.

ARGUMENT:

I

THE FRAMERS OF OUR CONSTITUTION INTENDED TO PRESERVE THE SOVEREIGN IMMUNITY OF STATE GOVERNMENTS

A. SOVEREIGN IMMUNITY PRIOR TO THE BILL OF RIGHTS

The subject of sovereign immunity was much on the minds of the Framers. Alexander Hamilton, in *Federalist*, No. 81,

raised the possibility that a citizen of one state might sue another state in federal court to collect a debt. He dismissed that possibility with the following emphatic statement of the general principle of sovereign immunity: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union."

Critics of the new Constitution were still troubled, however, by Article III, section 2, which spoke of federal courts hearing controversies between states and citizens of other states, or foreign citizens. George Mason and Patrick Henry feared that states would lose their sovereign immunity. James Madison, defending the Constitution before the Virginia Convention, insisted that states could only be sued in the new federal courts *with their consent*. Madison said: "The next case provides for disputes between a foreign state and one of our states, should such a case ever arise; and between a citizen and a foreign citizen or subject. I do not conceive that any controversy can ever be decided, in these courts, between an American state and a foreign state, without the consent of the parties. *If they consent*, provision is here made." 3 Elliot's Debates 533 [emphasis supplied].

John Marshall, in the same Convention, made the same assumption. Marshall said: "Suppose, says [a critic], in such a [federal] suit, a foreign state is cast; will she be bound by the decision? If a foreign state brought a suit against the commonwealth of Virginia, would she not be barred from the claim if the federal judiciary thought it unjust? The previous consent of the parties is *necessary*, and, as the federal judiciary will decide, each party will acquiesce." 3 Elliot's Debates, 557 [emphasis supplied].

James Iredell was a North Carolina delegate to the Constitutional Convention who responded to George Mason's "Objections to the New Constitution." In 1788, he wrote: "Mr. Mason has here asserted, 'That the judiciary of the United States is so constructed and extended as to absorb and destroy the judiciaries of the several states.' How is this the case? Are not the state judiciaries left uncontrolled as to the affairs of that state only?" Later on in his pamphlet, he wrote, "*In parting with the coercive authority over the states as states, there must be a coercion allowed as to individuals. The former power no man of common sense can any longer seriously contend for; the latter is the only alternative.*" Pamphlets, pp. 335-370; 3 Annals of America 249 [*emphasis in original*]. The very idea of an assertion of coercive authority over the states was abhorrent to those who had worked together to write the Constitution.

B. THE TENTH AMENDMENT

Despite these arguments based on the design and logic of the Constitution, critics still feared that the national government would be too powerful and eventually would eliminate the States as viable political entities. Samuel Adams argued that if the states were to be joined in "one entire Nation, under one Legislature, the Powers of which shall extend to every Subject of Legislation, and its Laws be supreme & controul the whole, the Idea of Sovereignty in these States must be lost." Letter from Samuel Adams to Richard Henry Lee (Dec. 3, 1787), reprinted in *Anti-Federalists versus Federalists* 159 (J. Lewis ed. 1967). Likewise, George Mason feared that "the general government being paramount to, and in every respect more powerful than the state governments, the latter must give way to the former." Address in the Ratifying Convention of Virginia (June 4-12, 1788), reprinted in *Anti-Federalists versus Federalists*, supra, at 208-209.

Proponents of the Constitution realized that it would take more than argument to satisfy these critics. They therefore promised that a Bill of Rights, including a provision explicitly reserving the undelegated powers of the States, would be among the first business of the new Congress. The amendments comprising the Bill of Rights were therefore proposed and adopted early in the first session of the First Congress. The final item in this Bill of Rights became the Tenth Amendment, which reserved all powers not specifically granted to Congress to the states and to the People, respectively. Since the new Constitution did not specifically grant Congress or the federal courts the power to revoke the sovereign immunity of the states, the Tenth Amendment seemed sufficient to protect all of the traditional prerogatives of the states.

C. CHISHOLM AND THE ELEVENTH AMENDMENT

The worst fears of the anti-federalists soon appeared to come true, however. When Georgia was sued in federal court by a citizen of South Carolina, Georgia claimed sovereign immunity and refused to appear in court. By a vote of four to one, however, the Supreme Court granted a default judgment against Georgia. The four justices in the majority based their reasoning, not on the original intent of the Framers, but on a *general* judicial power under Article III and the concept of states having only a *limited* sovereignty in a national democracy. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

James Iredell, who had argued that such a result could not occur, was now a Justice of the Supreme Court and was the lone dissenter.

This decision created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted. Almost one hundred years later, Justice Bradley wrote for the Supreme Court, "Looking back from our present stand-point at

the decision in *Chisholm v. Georgia*, we do not greatly wonder at the effect which it had upon the country. Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the states had been expressly disclaimed, and even resented, by the great defenders of the constitution while it was on its trial before the American people." *Hans v. Louisiana*, 134 U.S. 1, 12-13 (1890).

The Eleventh Amendment brought the law back into line with the original intent of the Constitution. It returned to those principles which the "great defenders of the constitution" had affirmed, giving concrete and specific expression to the abstract and general guarantee of the Tenth Amendment. It proved that Justice Iredell had gotten it right, while the other four justices, with their notion of "limited sovereignty," had gotten it wrong. Those early Americans who reacted so strongly to the *Chisholm* decision would not find this present case difficult to decide. They would protect sovereign immunity in state courts every bit as strenuously as they protected it in federal court.

It is important to remember that federal question jurisdiction was not authorized by Congress until the Judiciary Act of 1875. The Eleventh Amendment decisively closed the only door to intrusions against state sovereign immunity which was open at the time.

D. SUPREME COURT PRECEDENTS

The Eleventh Amendment was a direct, textual override of the *Chisholm* decision. *Chisholm* had said sovereign states could be sued in federal court under diversity jurisdiction. The Eleventh Amendment said they could not. It was a simple solution to a simple problem, which lasted until the problem became more complex. When Congress created federal question jurisdiction for the first time through the Judiciary Act

of 1875, it suddenly became possible for a citizen to sue his or her own state in federal court – a possibility not envisioned in the Eleventh Amendment.

When Louisiana was sued on this basis by one of its own citizens in the late 1880s, the Supreme Court looked to the history and practice of state sovereign immunity rather than to the text of the Eleventh Amendment. The Court noted, "The suability of a state, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm v. Georgia*; and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone furthest in sustaining suits against the officers or agents of states.... In all these cases the effort was to show, and the court held, that the suits were not against the state or the United States, but against the individuals; conceding that, if they had been against either the state or the United States, they could not be maintained." *Hans v. Louisiana*, 134 U.S. 1, 16 (1890) [internal citations omitted].

The next major case to test the limits of the Eleventh Amendment was *Monaco v. Mississippi*, 292 U.S. 313 (1934). The text of the Eleventh Amendment prohibited suits by "citizens of subjects of any foreign state," but not suits by foreign states themselves. Certain citizens of Monaco became understandably frustrated at Mississippi's default on \$100,000 worth of bonds which had been issued almost one hundred years earlier, especially since they had been accumulating interest at 5% and 6% for that entire time. (The bonds should have been worth over \$13,000,000 by 1934, when the case was decided.) The creditors finally donated the bonds to the Principality of

Monaco outright, hoping that Monaco might be able to collect where they had failed.

The Court noted the problems of reconciling the text of the Eleventh Amendment, the previous precedents on sovereign immunity, and the actual words of the Constitution, in, section 2. The Court wrote: "Manifestly, we cannot rest with a mere literal application of the words of section 2 of article 3, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting states. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that states of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.' The Federalist, No. 81. The question is whether the plan of the Constitution involves the surrender of immunity when the suit is brought against a State, without her consent, by a foreign State." *Monaco v. Mississippi*, 292 U.S. 313, 322-323 (1934) [footnotes omitted]. The Court relied on the principle of sovereign immunity to rule in favor of Mississippi.

Hans and *Monaco* are peculiar. Although they exemplify the spirit of the Eleventh Amendment, their holdings have little to do with the letter of that Amendment. Justice Bradley, who wrote the opinion in *Hans*, explained the inner logic of these cases:

This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, *actually reversed the decision of the supreme court....* This view of the force and meaning of

the amendment is important. It shows that, on this question of the suability of the states by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of *Chisholm v. Georgia*.

Hans v. Louisiana, 134 U.S. 1, 11-12 [emphasis supplied].

"Eleventh Amendment law" might therefore be better described as "Anti-*Chisholm* law." It stands for the principle that states retain their sovereign immunity in federal courts despite provisions of the Constitution that might suggest otherwise. If the Tenth Amendment had been more often enforced by this Court, one would have expected *Hans* and *Monaco* to have been premised on the Tenth Amendment's broad guarantee of the state's prerogatives rather than on the narrow and specific text of the Eleventh Amendment. Whatever the textual basis, this Court has certainly upheld the original intent of the framers of the original constitution (as reaffirmed by the Tenth and Eleventh Amendments) with respect to state sovereign immunity.

E. THE FOURTEENTH AMENDMENT EXCEPTION TO SOVEREIGN IMMUNITY

This Court has recognized one crucial exception to the general rule of state sovereign immunity – the Enforcement Clause of the Fourteenth Amendment. Writing for the majority in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 134 L. Ed.2d 252 (1996), Justice Rehnquist explained the Court's previous ruling in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976):

[W]e recognized that the Fourteenth Amendment, by expanding federal power at the

expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution. We noted that section 1 of the Fourteenth Amendment contained prohibitions directed at the states and that section 5 of the Amendment expressly provided that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." We held that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that section 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.

Seminole Tribe, 134 L. Ed.2d at 268 [internal citations omitted].

Thus, it is clear that when an act of Congress is designed to enforce Section 1 of the Fourteenth Amendment, Section 5 of that amendment contains the necessary override of state sovereign immunity, provided that Congress explicitly authorizes suits against states.

The Supreme Court of Arkansas misunderstood the significance of the Fourteenth Amendment exception when it considered Arkansas' immunity from suit in its own courts under the FLSA. In *Jacoby, v. Arkansas Dept. of Education*, 962 S.W.2d 773 (Ark. 1998), the Arkansas Supreme Court makes the same mistake as the dissent in *Seminole Tribe*, which characterized the Fourteenth Amendment exception as a "narrow and illogical exception." *Seminole Tribe*, 134 L.Ed.2d at 280. The majority in *Seminole Tribe* had a far better grasp of the right relationship between state sovereign immunity and

the Fourteenth Amendment. After the Fourteenth Amendment, Congress had the authority to grant citizens recourse when states deprived them of life, liberty, or property. To call this "narrow" or "illogical" is to forget the lives of half a million Americans that were lost in the Civil War.

The Arkansas Supreme Court has failed to note this Court's crucial distinction between civil rights statutes enacted pursuant to section 5 of the Fourteenth Amendment and other federal laws enacted under the Commerce Clause. This Court's unanimous holding in *Howlett v. Rose*, 496 U.S. 356 (1990), makes it clear that states *cannot* violate the civil rights of their residents by "relying on their own common-law heritage." But this Court's holding in *Seminole Tribe* makes it equally clear that there is a world of difference between the Fourteenth Amendment guarantee of each American's civil rights and the lesser protection of federal statutory entitlements. The Fair Labor Standards Act was *not* enacted pursuant to the Enforcement Clause of the Fourteenth Amendment, so Congress has no power to abrogate sovereign immunity in this case.

F. THE SUPREMACY CLAUSE

If this case were in federal court, the matter would already have been resolved under the Eleventh Amendment and the rule in *Seminole Tribe*. Originally, plaintiffs tried to sue states in federal courts because they knew the state was immune from suit in its own courts. Now plaintiffs try to sue states in state court because they know (after *Seminole Tribe*) that states are immune from suit in federal court. Obviously, hope still springs eternal in the human breast.

The plaintiffs in this case argue that they should win because of the Supremacy Clause. After all, the Constitution and laws

passed pursuant to it are as much laws in the states as laws passed by the state legislature. *Howlett*, 496 U.S. at 368. But this argument proves nothing: the state is immune from its *own* laws in its own courts. If federal laws "are as much laws in the states as laws passed by the state legislature," then Maine is immune from suit in its own courts under federal laws just like it is immune from suit in its own courts under its own laws. Unless Maine has somehow *waived* immunity, Maine is immune from suit.

II.

CONGRESS HAS NO COMMERCE CLAUSE POWER TO REGULATE STATE GOVERNMENT

Our founding fathers delegated certain powers to the federal government, reserving all powers not so delegated to the states and to the people, respectively. We believe that our founding fathers had no intention of subjecting the employment practices of state governments to the centralized control of Congress. No provision of the Constitution expressly delegates such power to Congress, and none of the ratification debates suggest that the framers felt any need for Congress to exercise such power.

The proposition that the federal government is a limited government possessing only enumerated powers is so well known—although little observed—as to require no citation for its proof. However, it is more difficult to find numerous or precise discussions in the historical record for the proposition we advance here—that the founders never intended to give Congress the authority to regulate labor conditions of the employees of state governments. However, one speech by James Madison in the Virginia ratification debates contains all of the essential elements of the principle which we advance.

The nature and tenor of the Virginia debates are well known. George Mason, Patrick Henry, and other men of stature opposed ratification because of the fear that the grant of power to the general government was too broad and the intrusions onto the powers of the states and the rights of the individuals were great and dangerous. Madison and other supporters of ratification repeatedly argued that the Constitution gave Congress and the general government only "delegated powers" and all others were reserved to the states.

In the midst of this debate, Madison made a speech which offered "some reflections to quiet the minds of those gentlemen who think that the individual governments will be swallowed up by the general government." Elliot, *Debates on the Adoption of the Federal Constitution*, Vol. 3, p. 257. Madison said:

In order to effect this, it is proper to compare the state governments with the general government, and with respect to the means they have of supporting themselves and encroaching on one another. At the first comparison, we must be struck with these remarkable facts. The general government has not the appointment of a single branch of the individual governments, or of any officers within the states, to execute their laws. Are not the states integral parts of the general government? Is not the President chosen under the influence of the state legislatures? . . . The senators are appointed altogether by the legislatures.

Id.

In other words, the states had the abilities to pick and influence federal officials. But the general government had no

power to pick, influence, or control state officials who "execute their laws."

Later, in this very same speech, Madison declared: "The powers of the general government relate to external objects, and are but few....All agree that the general government ought to have power for the regulation of commerce." *Id.* at 259-260.

Madison asserted two propositions in this speech which was designed to assuage the fears of those who believed the general government had been given too much power: (1) the general government has no authority to appoint or control state officials; and yet (2) all agree that the general government must have the power to regulate commerce. The only logical conclusion which can arise from these two statements is that the power to regulate commerce in no way embraced any power to regulate state officials.

Indeed in this same speech Madison set forth the common understanding of what the power to regulate commerce among the states was intended to achieve.

I will venture to say that very great improvements, and very economical regulations, will be made. It will be a principal object to guard against smuggling, and such other attacks on the revenue as other nations are subject to. We are now obliged to defend against those lawless attempts; but, from the interfering regulations of different states, with little success. There are regulations in different states which are unfavorable to the inhabitants of other states, and which militate against the revenue. New York levies money from New Jersey by her imposts. In New Jersey, instead of cooperating

with New York, the legislature favors violations on her regulations. This will not be the case when uniform regulations will be made.

Id. at 260.

Madison believed that the regulation of commerce among the states was designed to prohibit conflicting regulations and tariffs between the states. This Commerce Clause power cannot possibly contain a grant of power for Congress to control the employment of state officials. Madison expressly denied that any provision of the Constitution granted such a power. Such a conclusion would never have "quieted the minds" of Patrick Henry or George Mason. And Madison knew it.

CONCLUSION

For the foregoing reasons your amicus respectfully suggests that the application of original intent of the constitution requires affirmation of the decision below.

Respectfully Submitted,

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No. 98-436

IN THE
Supreme Court of the United States

CLERK

OCTOBER TERM, 1998

JOHN ALDEN, *et al.*,*Petitioners,*

v.

STATE OF MAINE,

*Respondent.*On Writ Of Certiorari
To The Supreme Judicial Court Of Maine

BRIEF OF THE STATES OF MARYLAND, ALABAMA,
ARIZONA, ARKANSAS, COLORADO, DELAWARE,
FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA,
IOWA, KANSAS, MASSACHUSETTS, MICHIGAN,
MISSISSIPPI, NEBRASKA, NEVADA, NEW
HAMPSHIRE, NEW JERSEY, NEW YORK, NORTH
DAKOTA, OKLAHOMA, OREGON, PENNSYLVANIA,
RHODE ISLAND, SOUTH CAROLINA, SOUTH
DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT,
VIRGINIA, WEST VIRGINIA, WISCONSIN, AND
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QUESTIONS PRESENTED

1. Does Congress lack the power under Article I of the Constitution to abrogate the States' immunity in their own courts from a suit brought by an individual under the Fair Labor Standards Act seeking retroactive monetary relief?

2. If it does, and a State nevertheless exercises its sovereign authority and lifts its immunity as to certain claims in its own courts, can Congress enlarge the State's consent to be sued, and unilaterally prescribe the terms and conditions of its limited immunity waiver, by forcing the State to entertain additional federal claims on the ground that they are of the "same type" as the claims to which the State has consented?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

 No. 98-436

JOHN ALDEN, *et al.*,*Petitioners,*

v.

STATE OF MAINE,

Respondent.

 On Writ Of Certiorari
To The Supreme Judicial Court Of Maine

BRIEF OF THE STATES OF MARYLAND,
ALABAMA, ARIZONA, ARKANSAS, COLORADO,
DELAWARE, FLORIDA, GEORGIA, HAWAII,
IDAHO, INDIANA, IOWA, KANSAS,
MASSACHUSETTS, MICHIGAN, MISSISSIPPI,
NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW
JERSEY, NEW YORK, NORTH DAKOTA,
OKLAHOMA, OREGON, PENNSYLVANIA,
RHODE ISLAND, SOUTH CAROLINA, SOUTH
DAKOTA, TENNESSEE, TEXAS, UTAH,
VERMONT, VIRGINIA, WEST VIRGINIA,
WISCONSIN, AND WYOMING AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT

Pursuant to Sup. Ct. R. 37, the signatory States
respectfully submit this brief as *amici curiae* in support of
respondent.

INTEREST OF *AMICI CURIAE*

The States have an obvious and significant interest in the questions this case presents. Since this Court decided *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the lower federal courts have uniformly held that the Eleventh Amendment bars actions brought under the Fair Labor Standards Act ("FLSA") against the States. In the wake of those decisions, private litigants throughout the country have refiled their FLSA suits in State courts. The outcome of this case will directly affect that litigation.

Moreover, FLSA actions are not the only ones that will be affected by a decision addressing the scope of Congress' authority under Article I of the Constitution to abrogate the States' immunity from suit in their own courts. Congress has exercised its Article I authority in enacting other statutes that, like the FLSA, create a cause of action that can be brought against the States. The decision in this case thus will also have an impact in cases filed under these other statutes. The *Amici* States have a strong interest, therefore, in the questions at issue in this action.

SUMMARY OF ARGUMENT

This case involves fundamental issues of federalism that affect one of the most basic rights of the *Amici* States: the right not to be sued in their own courts without their consent. That right was a core attribute of State sovereignty when the Constitution was ratified; it was made an explicit part of our national framework when the Eleventh Amendment was adopted; and it is as much an essential component of State sovereignty today as it was when this nation was formed over two hundred years ago. In holding that Congress lacks the authority under its Article I Commerce Clause powers to usurp what is and always has been an inviolable element of State independence and

integrity, the Supreme Judicial Court of Maine properly recognized these postulates and reached a decision that carefully preserves the historic balance of power that underlies and welds the relationship between the federal government and the States.

The Supremacy Clause does not defeat the States' right to maintain an immunity defense in an action brought in their own courts under the FLSA. That Act was passed pursuant to Congress' authority under Article I of the Constitution, which vests the federal legislature with no power to override unilaterally a State's claim of immunity in its own courts. The States are the exclusive source for abrogating their immunity, and few decisions are more sovereign in character than a State's exercise of its consent to be sued. Even when a State has chosen to lift its veil of immunity, the Supremacy Clause does not empower Congress to supplement that fundamental decision by enlarging the types of claims that the States have decided may be filed against them by private parties in State court.

Petitioners and the United States misplace their reliance, therefore, on this Court's tax refund claims for the contrary proposition. Although these cases allow a State court action seeking the recovery of unlawfully exacted taxes, that avenue of relief is not based on the Supremacy Clause but rather the decision of the States to establish procedures enabling taxpayers to pursue such a challenge. While the States have the authority to provide their consent to such suits, Congress does not have the power to do so unilaterally on the States' behalf under Article I or the Supremacy Clause. The decision below should accordingly be affirmed.

ARGUMENT

SOVEREIGN IMMUNITY BARS AN ACTION BROUGHT UNDER THE FAIR LABOR STANDARDS ACT AGAINST THE STATES IN STATE COURT

A. Congress Lacks The Power Under Article I Of The Constitution To Authorize Such Suits.

1. No authority exists to abrogate the States' Eleventh Amendment immunity in FLSA actions.

While petitioners assert that they have the right to file this action under the FLSA against the State of Maine in the courts of that State, it is undisputed that, due to the Eleventh Amendment, they are prohibited from bringing the same federal claims against the same defendant in federal court. In the federal court version of this litigation, the court of appeals in *Mills v. Maine*, 118 F.3d 37 (1st Cir.1997), concluded that, despite clear evidence of congressional intent to abrogate State sovereign immunity, "*Seminole Tribe* now precludes Congress from using its Commerce Clause powers or any of its other Article I powers to grant jurisdiction to federal courts in suits involving states that do not consent to be sued." *Id.* at 43. The court of appeals also held, as have other federal appellate courts that have addressed the issue, that "the 1974 amendments to the FLSA in dispute . . . here did not apply the Act's wage and hour provisions to the states and state employees as a legitimate exercise of congressional authority to adopt legislation under section five of the Fourteenth Amendment." 118 F.3d at 48. *Accord* *Abril v. Virginia*, 145 F.3d 182, 186-89 (4th Cir.1998); *Raper v. Iowa*, 115 F.3d 623, 624 (8th Cir.1997); *Aaron v. Kansas*, 115 F.3d 813, 817 (10th Cir.1997); *Wilson-Jones v. Caviness*, 99 F.3d 203, 206-11 (6th Cir.1997), *modified on other grounds*, 107 F.3d 358 (1998).

Thus, the court of appeals held that the Eleventh Amendment bars this suit in federal court not because Congress failed to express an intent to abrogate the States' Eleventh Amendment immunity under the FLSA, but rather because it lacks the constitutional authority to do so. In light of that decision, which petitioners did not ask this Court to review, this case presents no question concerning petitioners' ability to pursue their claims in federal court. Petitioners cannot sidestep the prohibitive sweep of Eleventh Amendment immunity merely by removing the locus of the action to State court.

2. The States did not surrender their immunity from suits brought in their own courts when they ratified the Constitution.

"The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." *Nevada v. Hall*, 440 U.S. 410, 414 (1979). Sovereign immunity bars a suit brought under the FLSA against the States in their own courts, but not because of the Eleventh Amendment, which involves the second of these two concepts and by its express terms confines "the Judicial power of the United States." *See also Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980). Rather, it does so because it is a core element of the States' sovereignty that they did not relinquish when they "established a more perfect union" by ratifying the Constitution. *Layne County v. Oregon*, 7 Wall. 71, 76 (1869).

As this Court has stated, "[f]or over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment." *Seminole Tribe of Florida v. Florida*, 517 U.S. at 67. That understanding "is rooted in a recognition that the States, although a union, maintain

certain attributes of sovereignty, including sovereign immunity." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). The States' immunity from suit in their own courts is perhaps the most fundamentally important aspect of their sovereignty. It is thus irrelevant, for the purpose of resolving the central issue this case presents, that the Eleventh Amendment "does not apply in state courts," *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63-64 (1989), as "[t]he Eleventh Amendment spells out one instance, but not the only one, in which respect and forbearance is due from the national to the state governments, a respect that cements our federation in the Constitution." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 210 (1991) (O'Connor, J., dissenting).

These federalism concerns that relate to the States' immunity, and that the Constitution strives to balance, are not limited solely to, or triggered only by, suits brought against the States in federal court. On the contrary, as this Court long ago recognized, "neither a State nor the United States can be sued as defendant in any court in this country without their consent. . . ." *Cunningham v. Macon & Brunswick Railway Co.*, 109 U.S. 446, 451 (1883). See also *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 321 (1837); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857); *Hans v. Louisiana*, 134 U.S. 1, 16 (1890). Dismissing the significance of these cases on the ground that they "were directed to the question whether a State could be sued without its consent in federal court, and did not resolve the question whether a State could be sued in another forum," U.S. Br. at 36, the United States asserts that "[a] private right of action in state court does not raise the same federalism concerns that arise when one sovereign is made to appear in the courts of another." *Id.* at 43. This

statement reflects a critical misunderstanding of the balance of power upon which the federal government's relationship with the States is based.

The ability to maintain that "fundamental constitutional balance between the Federal Government and the States," *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985), is equally jeopardized whether Congress authorizes individuals to sue the States in federal court, or passes legislation that seeks unilaterally to abrogate the "'established principle of jurisprudence' that the sovereign cannot be sued in its own courts without its consent." *Will v. Michigan Dept. of State Police*, 491 U.S. at 67 (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) at 529). At a minimum, the attribute of State sovereignty at issue in this case is at least as important as that which was at stake when petitioners originally brought suit against Maine in federal court. Arguably, it is more substantial, as "[t]he immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries." *Nevada v. Hall*, 440 U.S. at 414.

Indeed, as Justice Iredell stated more than two hundred years ago, "there is no doubt that neither in the State now in question, nor in any other in the Union, any particular legislative mode, authorizing a compulsory suit for the recovery of money against a State, was in being . . . when the Constitution was adopted. . . ." *Chisolm v. Georgia*, 2 Dall. 419, 434-35 (1793) (dissenting). Simply put, as the United States concedes, "[b]efore the Constitution was adopted, there was an established common-law principle that a State could not be sued in its own courts without its consent." U.S. Br. at 29. At the time the States debated the ratification of the Constitution, therefore, "[t]he suability of a state, without its consent, was a thing unknown to the law." *Hans v. Louisiana*, 134 U.S. at 16. Subject to one

exception that does not apply here, *see Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), that remains true today, as “it is not in the power of individuals to bring any State into court – the State’s or that of the United States – except with its consent.” *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting).

The States did not intend to renounce this significant feature of their sovereignty when they ratified the Constitution. On the contrary, quoting from a leading Supreme Court historian, this Court in *Edelman v. Jordan*, 415 U.S. 651, 660 (1974), observed that “[t]he right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted.” (Quoting 1 C. Warren, *THE SUPREME COURT IN UNITED STATES HISTORY* 91 (Rev. ed. 1973).) While that debate specifically addressed the proposed Article III clause defining the scope of federal judicial power, and thus “concerned questions of federal-court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts,” *Nevada v. Hall*, 440 U.S. at 420-21, the debate’s underlying theme involved the more general question whether the Constitution altered the sovereign right of the States not to be sued at all without their consent.

The spirit of the anti-Federalists’ views on this subject was well captured in a letter published in the February 21, 1788 edition of the New York Journal from New York

delegate Robert Yates (under the pseudonym “Brutus”), who decried the proposed Article III provision as “improper” “because it subjects a state to answer in a court of law, to the suit of an individual. This is humiliating and degrading to a government, and, what I believe, the supreme authority of no state ever submitted.” Brutus XIII, *reprinted in* B. Bailyn, *THE DEBATE ON THE CONSTITUTION, FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION*, Part Two, at 223 (1993). Asserting that “[t]he States are now subject to no such actions,” Brutus stated that “[a]ll contracts entered into by individuals with states, were made upon the faith and credit of the states, and the individuals never had in contemplation any compulsory mode of obliging the government to fulfil its engagements.” *Id.* The author predicted that the execution of judicial power under the proposed clause would “produce the utmost confusion, and in its progress, will crush the states beneath its weight.” *Id.* at 226.

The Federalists’ response resounded with a central theme: that the Constitution did not affect the States’ right not to be sued in *any* court without their consent. Addressing a similar objection made by George Mason at the Virginia convention, James Madison in June of 1788 stated that “[i]t is not in the power of individuals to call any state into court.” J. Elliot, 3 *THE DEBATES IN THE SEVERAL CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 533 (1888 ed.) (“Elliot’s Debates”). After Patrick Henry disputed Madison’s assertions, stating that they would “pervert the most clear expressions” of Article III of the proposed Constitution, *id.* at 543, John Marshall took the floor, first expressing the “hope that no gentleman will think that a state will be called at the bar of the federal court,” and then asking “[i]s there no such case at present?” *Id.* at 555. Emphasizing that “[i]t is not rational to suppose

that the sovereign power should be dragged before a court," *id.*, Marshall maintained that "[t]he intent is, to enable states to recover claims of individuals residing in other states," *id.*, and that "I see a difficulty in making a state defendant, which does not prevent its being plaintiff." *Id.* at 556.

During the same time frame in which the Virginia debates took place, Alexander Hamilton published a paper in New York, under the pen name "Publius," stressing that ratification of the Constitution would not divest the States of their immunity:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless, therefore, there is surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. . . . [T]here is no color to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.

The Federalist No. 81, at 487-88 (C. Rossiter ed. 1961) (emphasis in original).

In light of these passages, the United States misstates the central question in this case in terms of whether the Constitution operates to "confer or codify a rule of state sovereignty that restricts the power of Congress to create a federal cause of action that is enforceable against a State in state court." U.S. Br. at 29. The question is not whether the States can prove that the Constitution incorporates the

doctrine of sovereign immunity, but rather whether those challenging that immunity can provide clear and unequivocal proof that the States agreed to relinquish their pre-existing right not be sued in their own courts when they ratified the Constitution. The statements of the leading Framers quoted above strongly support the conclusion that the States did not do so, and certainly contain nothing that approaches clear and unambiguous proof that they did.

3. The States' adoption of the Eleventh Amendment confirmed their understanding that they could not be sued without their consent.

Although these Federalist assurances were subsequently disregarded in *Chis olm v. Georgia* in favor of a literalistic reading of Article III, the decision was met with universal disapproval, with the result that the Eleventh Amendment was quickly ratified thereafter so that it "established in effective operation the principle asserted by Madison, Hamilton and Marshall in expounding the Constitution and advocating its ratification." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934). In establishing "[a] state's freedom from litigation . . . as a constitutional right," *Great Northern Life Ins. Co. v. Read*, 322 U.S. at 51, the Eleventh Amendment confirms the impropriety in subjecting a State to suit before its own judiciary when it cannot be sued in federal court.

It makes little sense to acknowledge that the views of the leading Federalists "were clearly right, as the people of the United States in their sovereign capacity subsequently decided," *Hans v. Louisiana*, 134 U.S. at 14, by ratifying the Eleventh Amendment in the wake of *Chis olm v. Georgia*, and yet at the same time to cast those views aside when the States are sued in their own rather than the federal sovereign's courts. It would be a strange and hollow protection promised the States if it is beyond the power of

the Constitution to override their immunity in federal court, because that would result "in destruction of a pre-existing right of the State governments," *The Federalist* No. 81 (Hamilton), at 488 (C. Rossiter), but that the abrogation of a functionally identical immunity in the States' own courts would not "involve such a consequence," *id.*, and thus would be constitutionally proper. There is no merit, therefore, in the effort of the United States and petitioners to sidestep the compelling history surrounding the ratification of the Constitution and the Eleventh Amendment on the ground that these dealt only with the "judicial power of the United States." U.S. Br. at 28. *See also id.* at 29-36; Pet. Br. at 22-29.

Nor is their reliance on *Nevada v. Hall* persuasive, as that case did not involve a federal claim at all and thus did not present issues remotely similar to the one here, *i.e.*, whether Congress has the authority under Article I to compel State courts to disregard the bar of sovereign immunity and entertain a federal cause of action against the States. Rather, that case arose in the context of a tort claim that California residents brought in the courts of their own State, which waived immunity from such a claim, against the State of Nevada, which did not, and presented the altogether different question "whether the Constitution places any *limit* on the exercise of one State's power to authorize its courts to assert jurisdiction over another State." 440 U.S. at 421 (emphasis added). This Court found that there existed no such constitutional restriction "on the powers of California exercised in this case," *id.*, emphasizing that if it were to hold otherwise and thus find "that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the States – and the power of the people – in our Union." *Id.* at 426-27.

Rather than support the position that petitioners and the United States advocate, *Nevada v. Hall* confirms that their view, if adopted, would impose an equally substantial and "real intrusion" on State sovereignty. Indeed, instead of suggesting that a State court can be compelled to entertain a claim against its host State despite that State's assertion of sovereign immunity, this Court expressly asserted otherwise, stating that "no sovereign may be sued in its own courts without its consent," 440 U.S. at 416, and that "[o]nly the sovereign's own consent could qualify the absolute character of that immunity." *Id.* at 414. Thus, regardless of whether, as the United States argues, "the constitutional principle of sovereign immunity" does not bar "suits against a State in another forum," U.S. Br. at 30, this Court's decision in *Nevada v. Hall* makes clear that such suits would be barred when brought by individuals against the States in their own courts without their consent.

4. Congress has no power to abrogate the States' immunity under the FLSA because that law was not enacted pursuant to section 5 of the Fourteenth Amendment.

The States' ratification of the Civil War Amendments represents the only exception to this "fundamental rule of jurisprudence." *Ex parte New York, No. 1*, 256 U.S. 490, 497 (1921). Stating that the prohibitions of the Fourteenth Amendment are "restrictions of state power" because they "are directed to the States," this Court held in *Ex parte Virginia*, 100 U.S. 339, 346 (1880), that the enforcement of these laws "is no invasion of state sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact." *Id.* Thus, as this Court observed almost 100 years later, appropriate legislation passed under the Fourteenth Amendment does not violate the States' sovereign

immunity because such legislation is “grounded on the expansion of Congress’ powers – with the corresponding diminution of state sovereignty – found to be intended by the Framers and made part of the Constitution upon the States’ ratification of those Amendments, a phenomenon aptly described as a ‘carv[ing] out’ in *Ex parte State of Virginia*, *supra*, 100 U.S., at 346.” *Fitzpatrick v. Bitzer*, 427 U.S. at 455-56.

This historical development concerning the States’ immunity demonstrates that the federal power to abrogate that immunity has its source of authority in the States, and that the States have retained what they have not given away. Viewed against this backdrop, the FLSA does not constitute a legitimate abrogation of the States’ sovereign immunity in actions brought in their courts because, unlike the laws at issue in the cases in which such an abrogation has been found, the FLSA does not rest on any “power of Congress which has been enlarged.” *Ex parte Virginia*, 100 U.S. at 345. Petitioners make no claim that the FLSA is Fourteenth Amendment legislation, nor did they even cite that constitutional provision in their petition for certiorari or their merits brief. Rather, petitioners rely solely on Congress’ Article I powers in asserting that this suit may be brought against the State of Maine in its own courts without its consent. Article I does not abrogate the States’ immunity because the States did not surrender that immunity when they ratified the Constitution.

Rather, as this Court held in *Seminole Tribe*, even when Article I “vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.” 517 U.S. at 72. The sovereign immunity principles embodied in this constitutional limitation on federal judicial power apply

with equal force in cases brought by individuals against the States in State courts. Thus, regardless of whether the substantive requirements of the FLSA apply generally to the States, *see Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the FLSA does not provide sufficient authority for overriding the States’ immunity from suits brought in their own courts because the States did not vest Congress with such a power.

For these reasons, Article I does not give Congress the authority to abrogate the States’ immunity in their own courts from suits brought by individuals under the FLSA.

B. Congress Has No Power Under The Supremacy Clause To Pass A Law Pursuant To Article I Of The Constitution That Abrogates The States’ Sovereign Immunity In Their Own Courts.

1. The Supremacy Clause does not make “supreme” laws that are beyond Congress’ authority to enact.

Because no such congressional authority exists, petitioners and the United States are wrong in arguing that the Supremacy Clause requires State courts to entertain FLSA actions brought against the States. Contrary to the United States’ assertion that the State courts are bound whenever “Congress has acted pursuant to one of its enumerated powers,” U.S. Br. at 30, as this Court asserted in *Printz v. United States*, 117 S.Ct. 2365 (1997), “[t]he Supremacy Clause . . . makes ‘Law of the Land’ only ‘Laws of the United States which shall be made in Pursuance [of the Constitution]’; so the Supremacy Clause merely brings us back to the question discussed earlier, whether [such] laws . . . violate state sovereignty and are thus not in accord with the Constitution.” *Id.* at 2379 (first brackets in original, second added). The Supremacy Clause does not

override the obligation of State courts to respect a State's immunity defense in an FLSA action when Congress lacks the initial authority to abrogate that immunity.

On the contrary, the Supremacy Clause provides only that, "[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). See also *City of Boerne v. Flores*, 117 S.Ct. 2157, 2172 (1997) ("Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution."). Rejecting the argument that the States would be bound under the Supremacy Clause by any law that Congress saw fit to pass, Alexander Hamilton wrote that "[i]f individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. . . . But it will not follow from this doctrine that acts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land." The Federalist No. 33, at 204 (Rossiter) (emphasis in original). Rather, "[t]hese will be merely acts of usurpation, and will deserve to be treated as such." *Id.*

While the debates on the adoption of the Constitution did not directly address, in the context of the Supremacy Clause, the authority of Congress to override the States' immunity from suit in their own courts, the debates made clear that no constitutional authority existed to intrude upon similarly fundamental aspects of State sovereignty except to the extent expressly delegated to the federal government. At the Virginia convention John Marshall refuted George Mason's contention that, under the constitutional provision vesting the federal courts with jurisdiction "in all cases

arising under the Constitution and the laws of the United States, . . . the laws of the United States being paramount to the laws of the particular states, there is no case but what this will extend to." 3 Elliot's Debates at 553. Marshall asserted that Congress would not have such constitutional power (*id.*):

Has the government of the United States power to make laws on every subject? Does he understand it so? Can they make laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void.

James Iredell at the North Carolina convention advocated the same views in responding to the charge that, under the proposed Supremacy Clause, Congress would have the power to "produce an abolition of the state governments." 4 Elliot's Debates at 179. Iredell agreed that "when the Congress passes a law consistent with the Constitution, it is to be binding on the people." *Id.* He stated emphatically, however, that "[i]f Congress, under pretence of executing one power, should, in fact, usurp another, they will violate the Constitution." *Id.*¹

¹ Embracing the idea that the federal government lacked authority to alter traditional attributes of State sovereignty, Hamilton similarly stated that if "by some forced constructions of its authority (which, indeed, cannot easily
(continued...)

These passages constitute strong evidence that the Framers did not intend to vest Congress with the power to pass laws abrogating the States' right not to be sued in their own courts without their consent. That right is at least as fundamental as the States' right to pass laws governing property and contracts unhindered by the federal government. Indeed, while no constitutional provision expressly bars the federal government from making such laws, the limitation on the federal government's authority to force the States into federal court is affirmatively set forth in the Eleventh Amendment. Thus, "the principle of state sovereign immunity stands distinct from other principles of the common law in that only the former prompted a specific constitutional amendment." *Seminole Tribe*, 517 U.S. at 69. That bedrock constitutional principle of immunity does not assume a subordinated status when Congress seeks to expand the judicial power of the State courts rather than that of the federal judiciary. Sovereign immunity bars the federal legislature's expansion of any court's power to make an unwilling State a party before it.

Under this Court's decisions, "the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 105 (1984).

(...continued)

be imagined), the federal legislature should attempt to vary the law of descent in any State, would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon that of the State?" The Federalist No. 33, at 204 (Rossiter). See also *id.* at 205 (asserting that a federal law "abrogating or preventing the collection of a tax laid by the authority of a State (unless upon imports and exports) would not be the supreme law of the land, but usurpation of power not granted by the Constitution").

Congress' authority under the Supremacy Clause is not unlimited but rather is constrained by its lack of authority in Article I to abrogate the States' immunity. Given the absence of any such congressional power, this is not a case in which the States have asserted a right "to deny enforcement to claims growing out of a valid federal law," *Testa v. Katt*, 330 U.S. 386, 394 (1947), nor is this a proceeding in which the State courts have sought "to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Howlett v. Rose*, 496 U.S. 356, 371 (1990). The States do not deny the command of federal law, or its substantive application so as to require them to pay the overtime mandated by the FLSA. The States merely disagree that the federal government has unlimited authority to dictate how and where private individuals may seek to recover retroactive compensation for alleged violations of these obligations. The principles announced in *Testa* and *Howlett* are not violated by upholding the States' right to assert sovereign immunity in an FLSA action brought in State court, as Congress' attempt to abrogate the States' immunity is not "valid" and does not represent a "superior" law that the State courts are obligated to enforce.

The States take no issue, of course, with the well-settled rule in *Testa* and other cases that they "may not discriminate against rights arising under federal laws." *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 234 (1934). This case does not involve these issues, however, as the decision below simply ensures that neither a federal nor a State court may entertain an FLSA action against unconsenting States. The United States and petitioners thus misplace their reliance on these decisions and other cases – such as *Felder v. Casey*, 487 U.S. 131 (1988), in which the Court held that State courts must entertain suits brought against

municipalities and their officials under 42 U.S.C. § 1983 – because none of these cases involved the questions of State sovereign immunity at issue here. *See also Howlett v. Rose*, 496 U.S. at 365-66 (“Florida has extended absolute immunity from suit not only to the State and its arms but also to municipalities, counties, and school districts that might otherwise be subject to suit under § 1983 in federal court.”). A State does not engage in discrimination within the meaning of these decisions when it insists that it be accorded the same immunity in its own courts that it receives in federal court.

This Court in *Hilton v. South Carolina Public Railways Comm’n*, 502 U.S. at 206, agreed generally that “making a State’s liability or immunity, as the case may be, the same in both federal and state courts, has much to commend it.” Nevertheless, citing “the doctrine of stare decisis” and “a longstanding statutory construction implicating important reliance interests,” *id.* at 206-07, this Court refused to overrule a 28-year-old interpretation that Congress intended to subject the States to suit under the Federal Employers’ Liability Act (“FELA”), and held that an action brought under that Act that was barred by the Eleventh Amendment could be brought against the States in State court. *Hilton* does not stand for the broad proposition, however, that the Supremacy Clause requires State courts to entertain federal causes of actions that cannot be brought in federal court due to a lack of congressional power.

The issue in *Hilton* concerned “a pure question of statutory construction,” 502 U.S. at 205, involving Congress’ intent to create a cause of action against the States, which is far different from the issue here whether Congress has the authority to abrogate the States’ immunity in their own courts. In addressing the former question only, *Hilton* held merely that a federal cause of action, which is

barred by the Eleventh Amendment because of an absence of clear congressional intent to abrogate, can still be brought in State court. In reaching this conclusion, this Court assumed that Congress had the authority to abrogate immunity in FELA actions, as a plurality of the Court just two years before in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), held that the Commerce Clause grants Congress that power. That assumption is no longer valid in light of *Seminole Tribe*. Neither *Hilton* nor any other case holds that a State can “be forced to entertain in its own courts suits from which it was immune in federal court,” *Howlett v. Rose*, 496 U.S. at 365, when that immunity is based on a complete lack of congressional authority.

In these circumstances, the States, not Article I of the Constitution, are the sole source of authority for abolishing their immunity in their own courts. While a State’s waiver as to a State-law cause of action is equally a waiver as to an analogous federal-law claim, *see Testa v. Katt*, 330 U.S. at 392, the “substantive policy judgment,” U.S. Br. at 24, of whether a State chooses to waive immunity is for each State to make, not Congress, because it is up to each State, not Congress, to “prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted. . . .” *Beers v. Arkansas*, 61 U.S. (20 How.) at 529.

The United States is wrong, therefore, that “[a] State’s interest in determining when it will be subject to suit in its own courts for a violation of federal law loses all force when, as here, its courts entertain state-law claims of the same general type.” U.S. Br. at 43 n.7. A State’s consent to be sued is, perhaps more than any other choice it may make, “a decision of the most fundamental sort for a sovereign entity.” *Gregory v. Ashcroft*, 501 U.S. at 460. The Supremacy Clause does not provide Congress with the

authority to augment such a core exercise of State sovereignty. On the contrary, Congress has no power "to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure," *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 56 (1912), by adding to the category of claims that only the States can decide will be brought against them. See also *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994) ("The Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, *if the State permits*, in the State's own tribunals.") (emphasis added).

The States can thus refuse to waive their immunity from a class of claims that are brought in their own courts when Congress has no authority to abrogate that immunity, just as they can effect a limited waiver of immunity by imposing conditions on the pursuit of such claims in State court. Since a State may choose not to waive its immunity at all in its courts, it can certainly decide to subject that immunity waiver with respect to FLSA claims to the same conditions that apply to all other claims brought against the State. Neither of these choices would violate the Supremacy Clause and "discriminate in a manner detrimental to the federal right," *Felder v. Casey*, 487 U.S. at 146, because that "right" is subject to the States' exercise of their prerogative to decide whether and how to lift the shield of immunity in their own courts.

2. This Court's tax refund cases do not hold that the Supremacy Clause overrides the States' immunity from suit in their own courts.

In claiming otherwise, the United States (U.S. Br. at 34) and petitioners (Pet. Br. at 29-32) misplace their reliance on this Court's decisions in *Reich v. Collins*, 513 U.S. 106 (1994), and *McKesson Corp. v. Division of Alcoholic*

Beverages and Tobacco, Fla. Dept. of Business Regulation, 496 U.S. 18 (1990). While these cases allow a State court action challenging the collection of a purportedly unlawful tax, this is not because of the Supremacy Clause. Rather, it is the result of each State's choice in these cases to waive its immunity by providing a process in which taxpayers may challenge the validity of taxes that the State has imposed.

As this Court has observed, "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment. . . ." *Reich v. Collins*, 513 U.S. at 109 (quoting *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930)). "In such cases the immunity of the sovereign does not extend to wrongful individual action and the citizen is allowed a remedy against the wrongdoer personally." *Great Northern Life Ins. Co. v. Read*, 322 U.S. at 51. This is so whether suit is brought in State or federal court. See *Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459, 462 (1945) ("Where relief is sought under the general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally.") (citing *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280 (1912)). Rather than subject their officials to this type of liability exposure, many States have established a "procedure in lieu of the common law right to claim reimbursement from the collector," *Great Northern Life Ins. Co. v. Read*, 322 U.S. at 53, and by doing so have provided an opportunity for "taxpayers to raise their objections to the tax in a postdeprivation refund action." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. at 38-39.

Such a procedure amounts to a waiver of the State's

immunity in its own courts, but not necessarily in federal court. For example, as this Court stated in *Great Northern Life Ins. Co. v. Read*, 322 U.S. at 54, “[w]hen a state authorizes suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the Federal courts to be astute to read the consent to embrace Federal as well as state courts.” Rather, “when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state’s intention to submit its fiscal problems to other courts than those of its own creation must be found.” *Id.*

These tax cases thus do not stand for the proposition that the Supremacy Clause is the reason that a tax refund action which cannot be brought in federal court may nevertheless be pursued in State court. In an attempt to prove otherwise, petitioners and the United States latch on to a passage from *Reich v. Collins* in which this Court first asserted that such a State court action is proper, “the sovereign immunity States traditionally enjoy in their own courts notwithstanding,” 513 U.S. at 110, and then cited *Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459, as an example where “the sovereign immunity States enjoy in federal court, under the Eleventh Amendment, does generally bar tax refund claims from being brought in that forum.” *Reich*, 513 U.S. at 110. Neither *Reich* nor *Ford Motor Co.* holds, however, much less even suggests that it is due to the Supremacy Clause that such a refund claim can be brought in State court. Rather, the claim in *Reich* was brought in State court pursuant to a Georgia tax refund statute. *See id.* at 109, 111. This Court’s Eleventh Amendment holding in *Ford Motor Co.* was similarly based solely on its finding that the Indiana refund statute “which vests original jurisdiction of suits for refund in the ‘circuit or superior court of the county in which the taxpayer resides

or is located’ indicates that the state legislature contemplated suit in the state courts.” *Ford Motor Co.*, 323 U.S. at 466.

The statutes at issue in *Reich*, *Ford Motor Co.*, and *Great Northern Life Ins. Co.* are typical of those by which States afford taxpayers a postdeprivation opportunity in which to challenge a tax claimed to be unconstitutional or otherwise unlawful. *See also, e.g., Smith v. Reeves*, 178 U.S. 436, 441 (1900) (“It is quite true the state has consented that its treasurer may be sued by any party who insists that taxes have been illegally exacted from him under assessments made by the state board of equalization. But we think that it has not consented to be sued except in one of its own courts.”); *Chandler v. Dix*, 194 U.S. 590, 591 (1904). Those statutes (and the States’ consent to be sued that they set forth) are the reason, not the Supremacy Clause, that such actions may be brought in State rather than federal court. *Cf. Seminole Tribe*, 517 U.S. at 71 (“[T]his Court is empowered to review a question of federal law arising from a state court decision *where a State has consented to suit.*”) (emphasis added) (citing *Cohens v. Virginia*, 6 Wheat. 264 (1821))). While the States have authority to consent to such suits, Congress has no similar power under either Article I or the Supremacy Clause to do so on the States’ behalf.

3. It is consistent with the Supremacy Clause to sustain the defense of State sovereign immunity against an individual’s FLSA claim that seeks retroactive relief only.

The nature of the relief that petitioners seek confirms the propriety in upholding Maine’s defense of sovereign immunity against their claim that federal law has been violated. “Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest

in assuring the supremacy of that law.” *Green v. Mansour*, 474 U.S. 64, 68 (1986). This Court has thus long recognized that the Eleventh Amendment does not prevent a federal court plaintiff from obtaining injunctive relief on the basis of a State official’s continuing wrongful actions. *See Ex parte Young*, 209 U.S. 123 (1908). This case involves no ongoing violation of federal law, however, as the only relief that petitioners seek is retroactive back pay for overtime they worked but were not compensated. (Pet. App. 14a, 16a.) While “prospective and retrospective relief implicate Eleventh Amendment concerns,” only “the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause.” *Green v. Mansour*, 474 U.S. at 68.

Affirming the decision below in no way runs afoul of the Supremacy Clause because, as the United States acknowledges, “[u]nder the FLSA, . . . the Secretary of Labor may seek prospective relief.” U.S. Br. at 38. Although the United States complains that employees “may not seek prospective relief,” *id.*, and that the Secretary’s “enforcement capability” is limited, *id.* at 37 (quotations omitted), these are reasons for amending the FLSA and providing more funding to the Department of Labor. They do not justify a determination, however, that an action brought against a State that seeks relief solely on the basis of past wrongs gives rise to any paramount interest in upholding the supremacy of federal law. Just as “compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment,” *Green v. Mansour*, 474 U.S. at 68, the plaintiffs’ request for back pay does not implicate such compelling federal interests as to override Maine’s sovereign right not to be sued in its own courts.

The court below thus committed no error in rejecting petitioners’ claim that the courts of Maine were obligated to enforce this FLSA action against the State.

CONCLUSION

For the reasons stated, the judgment of the Supreme Judicial Court of Maine should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1998

JOHN H. ALDEN, et al.,

Petitioners,

versus

STATE OF MAINE,

Respondent.

On Writ of Certiorari to the Maine Supreme
Judicial Court

BRIEF OF *AMICUS CURIAE* COMMONWEALTH OF KENTUCKY IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae, The Commonwealth of Kentucky submits this Brief in support of Respondent, the State of Maine. The Commonwealth of Kentucky requests that this Court affirm the judgment of the Supreme Judicial Court of Maine which affirmed the State Superior Court's dismissal of Petitioner's claims that the State of Maine violated the provisions of the Fair Labor Standards Act (FLSA) 29 U.S.C. § 201 et seq.

Pursuant to Supreme Court rule 37.6, no counsel for any party in this case authored *Amicus Curiae* brief in whole or in part, and no person or entity, other than the *Amicus Curiae* made a monetary contribution to the preparation or submission of the brief.

The Commonwealth of Kentucky, like the State of Maine, is a party to a state court action by employees alleging a violation of the FLSA.¹

Like Maine, the Commonwealth of Kentucky maintains sovereign immunity.

WRITTEN CONSENT OF THE PARTIES

The Commonwealth of Kentucky has received a written consent of the Petitioners (from their counsel), the Respondent State of Maine (from the Department of Attorney General) and from the United States and the Solicitor General, pursuant to Supreme Court Rule 37.3(a). These letters of consent have been filed with the Clerk of the Court accordingly.

STATEMENT OF THE CASE

Petitioners who are parole and probation officers in Maine, sought to recover overtime pay to which they claimed

¹ *Lee Jackson, et al v. Commonwealth of Kentucky, et al*, Franklin Circuit Court, No. 96- CI-00621, Div. 1

entitlement by virtue of the FLSA, 29 U.S.C. 201 et seq., *supra*. Petitioner's began their action in U.S. District Court. After this Court rendered its decision in *Seminole Tribe v. Florida*, 517 U.S. 44, (1996) U.S. District Court dismissed Petitioner's claim. The decision was affirmed on appeal.² and Petitioners filed this action in a Maine superior court. The trial court dismissed the officers claim and the Respondent's appealed to the Maine Supreme Judicial Court which affirmed the Superior Court's dismissal on August 4, 1998. Petitioners' petition for writ of certiorari was filed on September 14, 1998 and was granted on November 7, 1998. 119 S.Ct. 443.

SUMMARY OF ARGUMENT

First, it has been established that Congress may not abrogate state sovereign immunity pursuant to the Commerce Clause in federal court. This Court's decision in *Seminole Tribe of Florida v. Florida*, *infra*, rests upon the principle of state sovereign immunity presupposed by the literal text of the 11th Amendment. In *Hans v. Louisiana*, *infra*, the Court recognized that the Eleventh Amendment applied to federal question jurisdiction. The Court has shown deference to state sovereignty by requiring an unequivocal statement of congressional intent in order to abrogate Eleventh Amendment immunity in federal courts in cases such as *Atascadero State Hospital v. Scanlon*, *infra*. Abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States and has historically been permissible only pursuant to the Fourteenth Amendment and, until *Seminole Tribe*, the Commerce Clause.

In 1975, *Fitzpatrick v. Bitzer*, *infra*, established the principle that legislation pursuant to the Fourteenth Amendment may abrogate state sovereignty. In doing so,

² *Mills v. State of Maine*, 118 F3d 37 (1st Cir. 1997)

the Court recognized that such abrogation would be unconstitutional in other contexts. The Court recognized that the Fourteenth Amendment was specifically directed at the States and that it provided that Congress should have the power to enforce its provisions. As the Fair Labor Standards Act is Commerce Clause legislation, it constitutionally attempts to impose monetary liability for individual claims upon the States without their consent.

Second, in *Printz v. United States*, *infra*, this Court held that the Supremacy Clause makes laws only constitutional laws supreme. When a federal law passed pursuant to the Commerce Clause violates state sovereign immunity, that law is not valid.

The check that constitutionality places upon supremacy is reflected by Alexander Hamilton's description of federal supremacy in the Federal Papers and subsequent decisions.

Third, the constitutional principle of state sovereign immunity extends beyond the literal text of the Eleventh Amendment and its narrow application to federal courts. This is implicit in the language used by the Framers and is explained by this Court's decisions. Federal question jurisdiction and the scope of the modern federal legislation was not contemplated by the Framers.

The States possess a "residuary and inviolable sovereignty" which is contemplated by the reservation of powers to the States not expressly delegated to the United States. This is reflected not only in the Tenth Amendment but throughout the Constitution's text. The constitutionality of state sovereign immunity is established also by this Court's decisions which recognize that the Eleventh Amendment is rooted in respect for the dignity of States as sovereign. "In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power of Article III." *Pennhurst State School and Hospital v. Halderman*, *infra*.

Fourth, if the Petitioners prevail, federal law will be asymmetrically applied in federal and state courts. The anomaly of claims pursuant to federal laws being only enforceable in state courts cannot be justified by dicta alone. The Court should consider the principle of symmetry in the application of the law and the law should be uniform in both federal and state courts. If the Fair Labor Standards Act is unconstitutional when it attempts to abrogate state sovereign immunity in federal court, it should also be unconstitutional to state court proceedings.

Fifth, our federalism is our unique contribution to the principles of domestic governance. It conceives of the national and state governments checking others and of both governments being democratically accountable to the people.

ARGUMENT

I. Congress Lacks Authority Under The Commerce Clause To Abrogate Sovereign Immunity Under The 11th Amendment

It has been proposed that the only limit upon the Federal Government's power to interfere with State functions may be found in the procedural safeguards inherent in the structure of the Federal system and that there should not be judicially created limitations on Federal power. *Garcia vs. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985). This Court has now held that the Eleventh Amendment denies Congress authority to abrogate state sovereign immunity pursuant to Commerce Clause Legislation. *Seminole Tribe of Florida vs. Florida*, 517 U.S. 44 (1996).

Petitioners assert that the Eleventh Amendment should be restricted to its literal terms in applying only to diversity cases involving "citizens of another state" and "citizens or subjects of any foreign state". This Court rejected

this literal construction. *Hans vs. Louisiana* 134 U.S. 1, (1890). *Chisholm vs. Georgia*, 2 Dall. 419, 1 L.Ed. 440 (1793), was a diversity case. It was decided by this Court on February 18, 1793. On February 19, a resolution was introduced in the United States House of Representatives which was redrafted and ratified within two years by the States as the Eleventh Amendment. "The text [of the Amendment] dealt in [its] terms only with the problem presented by the decision in *Chisholm*; in light of the fact that the Federal Courts did not have federal question jurisdiction at the time the Amendment was passed (and would not have until 1875), it seems unlikely that much thought was given to the prospect of federal question jurisdiction." *Seminole Tribe*, S.Ct at 1130.³ The Framers and Ratifiers of the Constitution were silent on the subject of federal question jurisdiction and the power of Congress to abrogate the States' immunity. *Id.* at 1130-1131. But "[t]he Court long ago held that the Eleventh Amendment bars a citizen from bringing suit against the citizen's own State in Federal Court." *Welch vs. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 472 (1987). It is clear that the presupposition which the Eleventh Amendment confirms extends beyond its text. *Blatchford vs. Native Village of Noatak*, 501 U.S. 775, 779 (1991).

The Court has shown significant deference to state sovereign immunity when examining attempts by Congress to abrogate that immunity. Nevertheless, this Court has rec-

³ Six years after the passage of the Eleventh Amendment, Congress enacted a statute providing for general federal jurisdiction. Act of February 13, 1801 §11, 2 Stat. 1992. It was repealed by the Act of March 8, 1802, 2 Stat. 132. *Seminole Tribe*, S.Ct at 1152 n. 12 (Souter, J. dissenting).

ognized that Congress, acting in the exercise of its enforcement authority under §5 of the 14th Amendment, may abrogate the States' 11th Amendment immunity. *Fitzpatrick vs. Bitzer*, 427 U.S. 445, 456 (1976). It has stressed, however, "that abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal government and the states". *Delmuth v. Muth*, 491 U.S. 223, 227 (1989) citing *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985). Abrogation places "a considerable strain on the principles of federalism that inform Eleventh Amendment doctrine". *Pennhurst State School and Hospital v. Halderman*, 475 U.S. 89, 100 (1984) quoting *Hutto v. Finney*, 437 U.S. 678, 691 (1978). This has Court tempered Congress' powers of abrogation pursuant to the Fourteenth Amendment with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure by applying a simple but stringent test: "Congress may abrogate the state's constitutionally secure immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute", *Atascadero, supra*, U.S. at 242 cited by *Dellmuth*, U.S. at 227.

This principle has been invoked to strike down attempts to abrogate Eleventh Amendment state sovereign immunity. *Atascadero, supra*; *Delmuth v. Muth, supra*; *Pennhurst State School, supra*. This Court has recognized that the important role played by the 11th Amendment and the broader principles that it reflects extend beyond the requirement of unequivocal statutory language. The Court has also considered whether Congress has the power to unilaterally abrogate the state's immunity from suit. Prior to *Fitzpatrick vs. Bitzer*, 427 U.S. 445, (1976), no such power had been identified. Only in the exercise of one other power, that of the Commerce Clause, has congressional abrogation of the state's Eleventh Amendment im-

munity been upheld, *Pennsylvania v. Union Gas Company*, 491 U.S. 1 (1989) overruled by *Seminole Tribe, supra*. Congress does not have the power to abrogate state sovereign immunity pursuant to the Interstate Commerce Clause, U. S. Constitution, Article I, cl. 8, *Seminole Tribe*, 116 S.Ct. at 1125.

In *Fitzpatrick*, the Court recognized: "that the 14th Amendment by expanding federal power at the expense of state autonomy, has fundamentally altered the balance of state and federal powers struck by the constitution". "§1 of the 14th Amendment contained prohibitions expressly directed at the states and . . . §5 of the Amendment expressly provided that the congress shall have the power to enforce by appropriate legislation, the provisions of this Article". Thus, the Court in *Fitzpatrick* found that "Congress may in determining what is appropriate legislation for the purpose of enforcing the provisions of the 14th Amendment, provide for private suits against the state or state officials which are constitutionally impermissible in other contexts". *Fitzpatrick*, 427 U.S. at 456, U.S. Constitution, 14th Amendment.

The Fair Labor Standards Act is legislation enacted pursuant to the Commerce Clause, *Aaron v. Kansas*, 1115 F.3d 813 10th Cir. (1997). The Petitioners' argue that the state sovereign immunity which this court has re-affirmed to be an essential part of the Eleventh Amendment does not adhere in state court. *Seminole Tribe, supra*. But this court has also held that a federal statute enacted pursuant to the Commerce Clause which violates the principle of state sovereignty when it imposes liability on the states is not enforceable. *Printz v. U.S.*, 521 U.S. 898 (1997). If the Fair Labor Standards Act is unconstitutional in its application to States how may it apply in state courts?

II. The Supremacy Clause Makes Laws of the Land Only Laws of the United States Which Shall Be Made In Pursuance of the Constitution

The Supremacy Clause requires state courts to enforce federal laws. *Howlett v. Rose*, 496 U.S. 356 (1990). But *Printz v. U.S.*, *supra*, makes it clear that supremacy is contingent upon constitutionality:

The supremacy clause, however, makes "laws of the land" only "laws of the United States which shall be made in pursuance [of the constitution]"; so the supremacy clause merely brings us back to the question discussed earlier, whether laws...violate state sovereign and are thus not in accord with the constitution. *Id.* 2379.

"It is incontestible that the constitution established a system of 'dual sovereignty'" *Id.* at 2376. The states retain a "residuary and inviolable sovereignty", *The Federalist*, No. 39, (James Madison) cited *Id.* at 2376. Although federal law is enforceable in state courts, it is not enforceable against states if that residuary and inviolable sovereign is transgressed. Alexander Hamilton contemplated such a possibility when he wrote:

It merits particular attention . . . , that the laws of the confederacy as to the enumerated and legitimate objects of its jurisdiction will become the supreme law of the land; to the observance of which all officers, legislative, executive and judicial in each state will be bound by the sanctity of an oath. Thus, the legislators, courts, and magistrates, of the respective members will be incorporated into the operations of the national government as far as its just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws." *The Federalist*, No. 27, (Alexander Hamilton).

This Court has held this language does not support the imposition on states or a variety of executive functions at the direction of the Federal Government. *Printz*, 116 U.S. at 2391 (Souter J. dissenting). In *Printz*, Congress unequivocally expressed its intent to abrogate State sovereign immunity but was held to have exceeded its "just and constitutional authority". Therefore, the Fair Labor Standards Act may only operate as supreme law of the land if its abrogation of state sovereign immunity is found to be constitutional as to state courts even though it is unconstitutional as to federal courts. "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent" would thereby be amended, to read: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual brought in Federal Court without its consent." This is an argument which would be tenable only if there simply were no constitutional principle of State sovereign immunity. *Atascadero*, *supra* (Brennan, J. dissenting).

III. There Is a Constitutional Principle of State Sovereign Immunity

The question of States' monetary liability pursuant to the Fair Labor Standards Act presents again the confrontation between those who believe that "there simply is no constitutional principle of State sovereign immunity" *Id.* and "those who believe our Federal system requires something more than an unitary, centralized government." *Garcia*, *supra*. This Court has held that the states retain their sovereignty in our Federal system and "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe*, *supra*; *Hans vs. Louisiana*, *supra*, citing *The Federalist* No. 81, (Hamilton) p. 487(C. Rossiter Ed. 1961).

Is state sovereign immunity restricted to being a token prohibition of the 11th Amendment to Federal Court jurisdiction? If the Supremacy Clause requires State courts to enforce federal law despite the assertion of sovereign immunity, the States are clearly subject to suit without their consent at the will of Congress. Opponents of ratification feared this outcome, but it was not the stated intention of the Constitution's proponents. In most of the States in 1789 "the doctrine of sovereign immunity forbade the maintenance of suits against States in state courts, although the actual effect of this bar in frustrating legal claims against the State was unclear." *Atascadero*, *supra*, 473 U.S. at 261 (Brennan, J. dissenting). When proposed, Article III seemed to make the State vulnerable to lawsuits by citizens of other States or foreign nationals before the newly proposed Supreme Court. The records of the Constitutional Convention "do not reveal any substantial controversy concerning the State citizen and State alien diversity clauses." *Id.* at 263. The question was however raised at State ratification conventions. Participants such as George Mason in Virginia found the prospect of States being sued for their war time debts "disgraceful" and "ludicrous". James Madison responded to Mason's concerns by assuring the Virginia Assembly with regards to Article III, that "it is not in the power of individuals to call any State into Court" and that the only operation [Article III] can have, is that, "if a State should wish to bring a suit against a citizen, it must be brought before the Federal Court" *Id.* at 265, citing 3 *J. Elliott, Debates on the Federal Constitution*, 526, 527. Patrick Henry followed, and, opposing ratification, took Madison to task for the literal text of Article III. *Id.* at 266 citing 3 *Elliott*, p. 549. John Marshall responded in favor of ratification, stating that "I hope that no gentleman will think that a State will be called at the bar of the Federal Court. It is not rational to suppose that

the sovereign should be dragged before a Court" *Id.* at 267, citing 3 *Elliott*, p 555-556.⁴

"A sober assessment of the ratification debates thus shows that there was no firm consensus concerning the extent to which the judicial power of the United States extended to suits against States" *Id.* at 278; but see *Employees vs. Missouri Department of Public Health*, 411 U.S. 279, 291 (1973). In *Chisholm v. Georgia* 2 Dall. 419 (1793) a majority of the Court held that federal jurisdiction extended to suits against states under the state citizen diversity clause. James Wilson, a supporter of the Constitution's ratification, who nevertheless disagreed with Madison Marshall and Hamilton about the effect of Article III on the sovereign immunity of the states and was a member of the Court's majority in *Chisholm*. Edmund Randolph who also supported the extension of the new federal jurisdiction to diversity actions against states, argued the case for *Chisholm* while Attorney General for the United States. *Welch*, *supra*.

Justice Iredell's dissent in *Chisholm* may have argued that it was the Judiciary Act of 1789 and not Article III that prevented the federal court from entertaining *Chisholm*'s diversity action against Georgia. Yet, Justice Iredell required an explicit statement of constitutional in-

⁴ Chief Justice Marshall's later opinions in *Cohens vs. Virginia*, 6 Wheat. 264 (1821) and *Osborne vs. Bank of The United States*, 9 Wheat. 738 (1824) have been used to argue that he could not meant what he apparently said. *Atascadero*, 473 U.S. at 268, 291-300 (Brennan, J. dissenting); *Welch*, 483 U.S. 506-510 (Brennan, J. dissenting). "Of course, the possibility that Marshall changed his views on sovereign immunity after the Constitution was ratified, or espoused a broader view of sovereign immunity only to secure ratification, does not imply that the views he expressed at the Virginia Convention should be disregarded." *Id.* at 482 n. 11.

tention before he would believe that the Constitution permitted suits against a state:

"My opinion being, that even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case. So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against the state for the recovery of money." *Chisholm*, 2 Dall. at 449.

Since there has been no explicit constitutional abrogation of state sovereign immunity nor any explicit retention of it as to federal question jurisdiction, inference is necessary. It is indisputable that "the States entered the federal system with their sovereignty intact." *Blatchford*, 501 U.S. at 779. "Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones which implication was rendered express by the 10th Amendment." *Printz*, 117 U.S. at 2376. "In our federal system, the states have a major role that cannot be pre-empted by the national government. As contemporaneous writings and the debates at the ratifying conventions made clear, the States' ratification of the constitution was predicated on this understanding of federalism." *Garcia*, 469 U.S. at 568 (Powell J. dissenting). It is this role that the Tenth Amendment protects:

The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively, or to the people.
U.S. Constitution, Tenth Amendment

The states sovereignty is thus rendered residuary and inviolable. "This is reflected throughout the constitution's

text." *Lane County v. Oregon*, 7 Wall. 71, 19 L.Ed. 101 (1869); *Texas v. White*, 7 Wall. 700, 725 19 L.Ed. 227 (1869). In *Printz*, the court listed these examples of the States' sovereignty: The prohibition on any involuntary reduction or combination of states territory, Article IV, § 3; the Judicial Power clause, Article III, §2; and the Privilege and Immunities clause, Article IV, § 2, which speaks of the "citizens" of the states; the amendment provision, Article V, which requires the votes of three-fourths of the states to amend the Constitution; and the Guarantee Clause, Article IV, §4 which "pre-supposes the continued existence of the states and those means and instrumentalities which are the creation of their sovereign and reserved rights," *Helvering v. Gerhardt*, 304 U.S. 405, 414-415 (1938). It is reasonable to resolve the significant constitutional question of the status of state sovereign immunity within the "plan of the convention" by implication from the structure of our federalism. *Myers v. United States*, 292 U.S. 52 (1926) (finding by implication from Article 2, § 1 & 2 that the president has the exclusive power to remove executive officers); *Plaut v. Spendthrift Farm, Inc.* 514 U.S. 211 (1995) (finding that Article 3 implies a lack of congressional power to set aside final judgments) cited by *Printz*, 117 U.S. at 2379 n. 13.

The constitutionality of state sovereign immunity also finds support in this Court's Eleventh Amendment jurisprudence. This Court has held that "the very object and purpose of the Eleventh Amendment [is] to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties," and that the "Amendment is rooted in the recognition that the states, although a union, maintain certain attributes of sovereignty, including sovereign immunity . . . It thus accords the states the respect owed them as members of the federation." *P.R. Aqueduct and Sewer Authority v. Metcalf*

& *Eddy*, 506 U.S. 139, 146 (1993). The Court was perfectly clear in *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934):

Neither the literal sweep of the words of Clause 1 of § 2 of Article III, nor the absence of restriction in the letter of the Eleventh Amendment, permits the conclusion that in all controversies of the sort described in Clause one, and omitted from the words of the Eleventh Amendment, a state may be sued without her consent. Thus Clause one specifically provides that the judicial power shall extend "to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States and the Treaties made or which shall be made, under their Authority." But although a case may arise under the constitution and laws of the United States, the judicial power does not extend to it if the suit is sought to be prosecuted against a State, without her consent, by one of her own citizens . . . Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting states. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention." *Id.* at 321-323

Upon considering *Monaco* the Court concluded that "in short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Article III." *Pennhurst*, 465 U.S. at 98.

IV. State Sovereign Immunity Should Apply Symmetrically in Federal and State Courts

If the Eleventh Amendment does not apply in state courts, federal causes of action will be asymmetrically applied in federal and state courts. The application of the Eleventh Amendment to the Fair Labor Standards Act in federal courts only, will produce the "remarkable anomaly" of "a statutory scheme in which state courts are the exclusive avenue for obtaining recovery under a federal statute". *Hilton v. South Carolina Pub. Ry. Comm'n*, 502 U.S. 197 (1991) (Scalia J. dissenting). The Court has suggested that where *stare decisis* does not adhere, the laws preference for symmetry might require that a state's liability or immunity be the same in both federal and state courts. *Id.*, 566. The Eleventh Amendment's application already extends beyond its text. *Seminole Tribe*, 1122. This confusing result will be avoided if it extends to state courts proceedings.

There is dicta, such as that cited in *Hilton*, which states that the Eleventh Amendment does not apply in state courts. In *Hilton*, for example, the court cites the 7th footnote in *Maine v. Thiboutot*, 100 S.Ct. 2502 (1980). It does state that "the Eleventh Amendment does not apply in state courts." *Maine v. Thiboutot*, *supra*, dealt with the question of whether a claim for welfare benefits can be brought against the state under §1983 and attorneys fees awarded under the Civil Rights Attorneys Fee Awards Act of 1976 §1988. It does not consider the question of whether or not it is rational to make state courts the exclusive tribunal for maintaining federal causes of action. *Nevada v. Hall*, 99 S.Ct. 1182 (1979), another case cited by *Hilton* does discuss sovereign immunity. It deals with the question of whether one state may be held immune in another state's courts. *Id.*, p. 1183. Relying on Mr. Justice Holmes' explanation that sovereign immunity is based "on the logical and practical ground that there can be no legal right as

against the authority that makes the law on which the right depends"⁵, the decision finds that "this explanation adequately supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts". *Id.*, p. 1186. Its statement that the Eleventh Amendment does not apply in state courts is dicta.

As has been explained *supra*, when the Eleventh Amendment was ratified there was no federal question jurisdiction in the federal courts. The possibility that federal legislation would require that federal causes of action be maintained against states in state court could not have been anticipated. It is not now a matter which has been carefully considered. When in *Hilton*, the Court considered the anomaly of FELA causes of action applying solely in state courts and it considered whether or not the rule of statutory construction requiring a clear statement of congressional intent to impose monetary liability on the States might not be used to resolve the anomaly, observing as follows:

The requirement [of a clear statement by Congress] serves to make parallel two separate inquiries into state liability: Eleventh Amendment doctrine and canons of statutory interpretation. In most cases, as in *Will* and *Gregory v. Ashcroft*, the rule can be followed. The resulting symmetry, making a state's liability or immunity, as the case may be, the same in both federal and state courts, has much to commend it. It

⁵ See, *Kawananakoa v. Polyblank*, 205 U.S. 349, 527 (1907). Justice Holmes formulation is that "a sovereign is exempted from the suit, not because of any formal conception or absolute theory, but on the logical and practical ground that there could be no legal right as against the authority that makes the law on which the right depend." But see *Seminole Tribe*, 1143-1144 (Stevens, J. dissenting)

also avoids the federalism-related concerns that arise when the national government uses the state courts as the exclusive forum to permit recovery under a congressional statute. This is not an inconsequential argument. Symmetry in the law is more than just esthetics. It is predictability and order. But symmetry is not an imperative which must override just expectations which themselves rest upon the predictability and order of *stare decisis*. *Id.*, 556.

Hilton remains the sole decision of this court in which the asymmetrical application of a law imposing monetary liability on states has been upheld. Significantly, the "analysis and ultimate determination" of the case was "controlled and informed by the central importance of *stare decisis* in this Court's jurisprudence." *Id.*, 563. There was no finding that the Eleventh Amendment did not apply in state courts, though there was clearly an opportunity to make such a finding.

The *Hilton* decision refers to *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). In *Will* the Supreme Court found that state sovereign immunity was not abrogated by 42 U.S.C. 1983 because a state is not a person within the meaning of the act. *Id.*, 2312. A rule of statutory interpretation from Eleventh Amendment jurisprudence requiring a clear statement was used to reach this conclusion. The court stated that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Id.*, 66 citing *Atascadero*, 242. The Court explained that it did not believe that §1983 could provide individuals with the right to sue states in State Court for civil right's claims because Congress did not explicitly abrogate the state's immunity under the Eleventh Amendment. The decision reasons as follows:

That Congress, in passing 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the federal-state balance and in that respect was made clear in our decision in *Quern*. Given that a principal purpose behind the enactment of §1983 was to provide a federal forum for civil rights claims, and that Congress did not provide such a federal form for civil rights claims against States, we cannot accept petitioner's argument that Congress intended nevertheless to create a cause of action against States to be bought in state courts, which are precisely the courts Congress sought to allow civil rights claimants to avoid through § 1983. *Id.*, 2310.

The implication here is clear. What the Eleventh Amendment affects in federal courts should be reflected in state courts. While *Will* relies upon a rule of statutory construction, the same reasoning applies to constitutional analysis. It is, after all, deference to the constitutional significance of state sovereign immunity that led to the development of this rule of statutory construction.

Howlett v. Rose, 496 U.S. 356 (1990), a decision relied upon heavily by the Petitioners, has similar implications. The first paragraph of Justice Stephen's decision in this case posed the question as follows:

The question in this case is whether a state law defense of 'sovereign immunity' is available to a school board otherwise subject to suit in a Florida court *even though such a defense would not be available if the action had been bought in a federal forum*.

Id., 358-359 (emphasis added). The Court in *Howlett* found that a state law sovereign immunity defense is not available to a school board in a §1983 action brought in a State court that otherwise has jurisdiction when such defense would not be available if the action were brought in a federal forum. The decision, at least in part, may be said to turn on the symmetrical application of federal and state court jurisdiction.

The Court in *Howlett* commented that,

"the anomaly identified by the State Supreme Court, and by the various State courts which it cited, that a state might be forced to entertain in its own courts suits from which it was immune in Federal court, is . . . fully met by our decision in *Will*. *Will* establishes that the State and the arm's of the State which have traditionally enjoyed Eleventh Amendment's immunity, are not subject to suit under §1983 in either Federal court or State court."

Id., 365.

The situation before the Court now differs from *Howlett* in that it was not the intent of Congress that there be no jurisdiction in Federal courts. Nevertheless, where, as here, *stare decisis* does not control, the need for order and predictability should govern. Congressional abrogation of the States' constitutional sovereign immunity via the Commerce Clause power is unconstitutional. It should be established here that "the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit . . . in either federal court or state court" pursuant to the Fair Labor Standards Act.

V. Federalism Is Our Constitution's Unique Contribution to Principles of Democratic Government.

In The Federalist Papers, Madison described the unique division of authority which distinguishes the Constitution. As opposed to "single republic" in which "all the power surrendered by the people is submitted to the administration of a single government" In the Federalist No. 51, p. 350 (J. Cooke ed. 1961) he contrasted a republic in which the powers delegated to the United States would be "few and defined," The Federalist No. 45, p. 313. The federalism that we have has a far greater role for the national government than Madison or any of the Framers could have imag-

ined. It is even far greater than living generations could imagine. See Wechsler, *The Political Safeguards of Federalism: The Role of the States and the Composition and Selection of the National Government*, 54 *Columbia Law Review*, 543 (1954) ("National action has . . . always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case."), cited by *Garcia* 469 U.S. at n 9. "This Court has been increasingly generous in its interpretation of the commerce power of Congress," *Id.*, at 581 (Powell, J. dissenting). There is no reason the Constitution should rigidly conform to Madison's conception.

"Federalism was our nations own discovery. The framers split the atom of sovereignty." *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1872 (1995) (Kennedy, J. concurring). As a result, "the people possessing this plenary bundle of specific powers were free to parcel them out to different governments and different branches of the same government as they saw fit." *Seminole Tribe*, 116 S.Ct at 1170, (Souter, J. dissenting). Madison saw this division of the government into distinct and separate departments as protecting the people against "usurpations" against their liberty. There was to be a "double security" arising "to the rights of the people" from having "different governments . . . control each other; at the same time that each will be controlled by itself." *The Federalist* No 51, p 351. This conception has now triumphed in Europe in the form of the principle of subsidiarity, The Treaty on European Union, Article 3b. This basic democratic principle that decisions be made at the most local level as is practical and consistent with the overall good was ours originally.

The States are themselves democratic polities accountable to the people and to their employees as constituents as well. Our federalism requires that this be respected.

CONCLUSION

The *Amicus Curiae*, Commonwealth of Kentucky, requests that the judgment of the Maine Supreme Judicial Court should be affirmed.

Respectfully submitted this 12th day of February 1999.

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No. 98-436

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

JOHN ALDEN, *et al.*,
v. *Petitioners,*
STATE OF MAINE,
Respondent.

On Writ of Certiorari to the
Supreme Judicial Court of Maine

BRIEF OF THE NATIONAL CONFERENCE OF
STATE LEGISLATURES, NATIONAL GOVERNORS'
ASSOCIATION, COUNCIL OF STATE
GOVERNMENTS, INTERNATIONAL CITY/COUNTY
MANAGEMENT ASSOCIATION, U.S. CONFERENCE
OF MAYORS, INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION, NATIONAL ASSOCIATION
OF COUNTIES, AND NATIONAL LEAGUE OF CITIES
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

The Fair Labor Standards Act of 1938 authorizes private actions for overtime compensation to be brought "in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b). The Superior Court of Maine declined to hear such an action because it was barred by sovereign immunity. The questions presented are:

1. Whether Congress had power under the Commerce Clause of the United States Constitution to require the Superior Court of Maine to hear this action.
2. Whether the Supremacy Clause of the United States Constitution, of its own force, required the Superior Court of Maine to hear this action.

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INTEREST OF THE AMICI CURIAE

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. They have a compelling interest in the issues presented in this case, which are: (1) whether Congress can use the Commerce Clause to compel state courts to adjudicate actions that the courts lack power to hear under state law; and (2) whether the Supremacy Clause, of its own force, compels a state court to hear a private, federal claim for monetary relief against its own State, without the State's consent, if the State has consented to be sued in its courts on unrelated state-law claims for monetary relief. Those issues directly implicate the States' authority "to establish the structure and jurisdiction of their own courts." *Johnson v. Fankell*, 521 U.S. 911, 919 (1997) (internal quotation marks and citation omitted). *Amici* therefore submit this brief to assist the Court in the resolution of this case.¹

STATEMENT

Petitioners are current and former probation officers employed by respondent, the State of Maine. Pet. App. 1a n.1; J.A. 16, 43. They brought this action against the State in the Superior Court of Maine after an essentially identical action in federal court was dismissed on Eleventh Amendment grounds. See Pet. App. 2a.² Here, as in their federal-court action, petitioners sought overtime com-

¹ Pursuant to this Court's Rule 37.2(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

² The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

pensation and liquidated damages from the State under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq.* They asserted a cause of action under Section 216(b) of the FLSA.³

The Superior Court of Maine entered judgment for the State, holding that this action was barred by sovereign immunity. Pet. App. 14a-24a. The Maine Supreme Judicial Court affirmed on the same ground. *Id.* at 1a-7a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Maine Supreme Judicial Court based the judgment below upon the state law of sovereign immunity. See Pet. App. 3a-4a. The court regarded that immunity as protected from congressional abrogation by the U.S. Constitution. See *id.* at 4a-6a. In particular, the court relied on the constitutional "postulate" (*Monaco v. Mississippi*, 292 U.S. 313, 322 (1934)) of which the Eleventh Amendment "is but an exemplification": namely, "[t]hat a state may not be sued without its consent." *In re New York*, 256 U.S. 490, 497 (1921). See Pet. App. 4a.

The parties dispute whether the U.S. Constitution gives States an immunity in their own courts that corresponds to

³ The overtime provision of the FLSA is 29 U.S.C. § 207. Section 216(b) of the FLSA, 29 U.S.C. § 216(b), provides in pertinent part:

Any employer who violates the provisions of * * * section 207 of [Title 29] shall be liable to the employee or employees affected in the amount of * * * their unpaid overtime compensation, * * * and in an additional equal amount as liquidated damages. * * * An action to recover the liability prescribed in * * * the preceding sentence[] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. * * *

The FLSA defines "[p]ublic agency" to include "the government of a State or political subdivision thereof; [and] any agency of * * * a State, or a political subdivision of a State." 29 U.S.C. § 203(x).

their immunity in federal court. See Brief for Petitioners (hereafter "Alden Br.") at 22-32; Brief for the United States (hereafter "U.S. Br.") at 27-36; Brief of Respondent (hereafter "Maine Br.") at 14-40. We agree with respondent that the Constitution does give States such immunity in their courts. The Court need not reach that issue, however, under our view of the case.

Insofar as the judgment below rested on an interpretation of state law, that interpretation binds this Court. See, e.g., *Palmer v. Ohio*, 248 U.S. 32, 34 (1918). The threshold question is whether the state-law basis for the judgment is invalid under federal law. The answer is "no." Contrary to petitioners' contention, the state law is neither preempted by Section 216(b) of the FLSA nor invalidated by the Supremacy Clause of its own force.⁴

1. Section 216(b) of the FLSA did not require the Superior Court of Maine to hear this action. To the extent that Section 216(b) is construed to impose such a requirement, it exceeds Congress's power.

Early decisions of this Court recognized that Congress lacks power to compel state courts to hear actions outside their jurisdiction under state law. Those decisions reflected principles that were broadly accepted and well-established.

Later decisions of the Court held that the Supremacy Clause sometimes obligates state courts to enforce federal law. The later decisions indicated, however, that Congress cannot enlarge the enforcement obligations imposed on state courts by the Supremacy Clause. The later decisions thus confirm the early decisions.

The Court's decisions in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521

⁴ Because the judgment below rested on state law, it can be reversed only if the state-law basis for the judgment is invalid on one of the two federal-law grounds asserted by petitioners. Thus, even if petitioners were correct that the U.S. Constitution does not bar this action, that would not justify reversal of the judgment below.

U.S. 898 (1997), reaffirm that the Supremacy Clause is the sole source of a state court's obligation to enforce private rights created by federal statutes enacted under the Commerce Clause. Moreover, the reasoning of *New York* and *Printz* confirms that Congress cannot use the Commerce Clause to require a state court to hear a federal claim that the Supremacy Clause would not require it to hear. Such commandeering of state courts violates the principle of dual sovereignty established by the Constitution.

The violation is particularly grave when, as here, Congress compels the state courts to hear private claims for retroactive monetary relief against their own State to which the State has not consented. That form of compulsion should not be sustained even assuming that Congress can compel state courts to hear other types of claims.

2. The Supremacy Clause did not of its own force require the Superior Court of Maine to hear this action. The Supremacy Clause invalidates state laws that permit or require state courts to discriminate against federal claims. The Clause does not otherwise add to the jurisdiction of state courts. Thus, the Supremacy Clause would not invalidate a state law that barred *all* claims against the State in state court, because such a law does not discriminate against federal claims. And the Clause would not compel a state court to hear a federal claim against the State, because the court would lack power to do so under neutral state law (which includes the state law of immunity).

When a State partially waives immunity in its courts, those courts do not become obligated to hear all federal claims against the State. Rather, the Supremacy Clause requires a state court to hear a federal claim against the State only if the court has power under state law to hear a state-law claim against the State arising from the same facts as does the federal claim. This is clear from decisions of this Court concerning the effect of a State's waiver of sovereign immunity in federal court. Those decisions

establish that, by consenting to the adjudication of a claim, a State does not expose itself to factually unrelated claims.

Maine law did not empower the Superior Court of Maine to hear an action against the State based on the facts underlying petitioners' FLSA claims. The Supremacy Clause therefore did not require the Superior Court to hear those claims.

ARGUMENT

FEDERAL LAW DID NOT REQUIRE THE SUPERIOR COURT OF MAINE TO HEAR THIS ACTION

The Maine Supreme Judicial Court held that this action was barred by the state law of sovereign immunity. See Pet. App. 2a-7a. Petitioners contend that the state law is invalid because it (1) "is inconsistent with federal law"; and (2) "discriminates against claims brought under federal law." U.S. Br. 24; see Alden Br. 19 & 32-33. Specifically, petitioners argue that the state law is inconsistent with Section 216(b) of the FLSA and is therefore preempted by it. U.S. Br. 26-27; Alden Br. 19. This preemption argument, of course, rests on Section 216(b) as buttressed by the Supremacy Clause.⁵ Petitioners' discrimination argument rests on the Supremacy Clause alone, as construed in the line of cases that includes *Testa v. Katt*, 330 U.S. 386 (1947). See U.S. Br. 21-26; Alden Br. 32-37.

Petitioners' preemption argument has independent significance only if Section 216(b) of the FLSA requires state courts to hear cases that the Supremacy Clause, standing alone, would not require them to hear. We show

⁵ U.S. Const. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

in Part I below that Section 216(b) does not impose obligations on state courts beyond those imposed by the Supremacy Clause.

We show in Part II below that the Supremacy Clause did not of its own force require the Superior Court of Maine to hear this action. The Supremacy Clause invalidates state laws that permit or require state courts to discriminate against federal law. The judgment below does not rest on such a law.

I. THE FLSA DID NOT REQUIRE THE SUPERIOR COURT OF MAINE TO HEAR THIS ACTION, BECAUSE CONGRESS LACKS POWER TO IMPOSE SUCH A REQUIREMENT

A federal statute preempts state law only if the federal statute falls within an enumerated power of Congress. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Section 216(b) of the FLSA does not fall within Congress's power to the extent that it compelled the Superior Court of Maine to hear this action. Section 216(b), like the rest of the FLSA, rests on the Commerce Clause. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537-556 (1985). Congress cannot use that Clause to compel state courts to hear actions that fall outside their jurisdiction under state law.⁶

⁶ As a matter of statutory interpretation, Section 216(b) of the FLSA should not be read to have required the Superior Court of Maine to hear this action. Section 216(b) authorizes an action only in a "State court of competent jurisdiction." 29 U.S.C. § 216(b). Because this action was barred by sovereign immunity, the Superior Court of Maine was "not competent to render judgment against a nonconsenting State." *Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 284 (1973) (holding that prior version of Section 216(b) did not abrogate Eleventh Amendment immunity); see also note 22, *infra* (citing Maine case law). For reasons discussed in this brief, Section 216(b) raises serious constitutional issues, at least, if it is construed to compel the Superior Court to hear this action. The statute therefore should not be so construed. See, e.g., *Edward J.*

A. Early Decisions of This Court Recognize That Congress Cannot Compel State Courts to Adjudicate Cases That Fall Outside Their Jurisdiction Under State Law

This Court recognized early on that Congress lacks power under the original Constitution to compel state courts to hear cases outside their jurisdiction under state law. The Court expressed that recognition in two ways. First, the Court said that, even when state courts adjudicate federal claims, they are exercising power derived from state law.⁷ More to the point, the Court said that Congress cannot confer jurisdiction on state courts.⁸ Those

DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 463 U.S. 147, 157 (1983). Furthermore, Section 216(b) serves a useful function if it is read only to permit state courts to hear FLSA actions when they have jurisdiction to do so under state law. So read, it avoids uncertainty about whether a private cause of action under the FLSA is enforceable exclusively in federal court. Cf., e.g., *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 822 & n.2 (1990).

⁷ See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 337 (1816) (stating that state courts have concurrent jurisdiction over Art. III cases "only * * * in those cases where, previous to the constitution, state tribunals possessed jurisdiction independent of national authority"); *Clafin v. Houseman*, 93 U.S. (3 Otto) 130, 137 (1876) (holding that state courts could entertain actions authorized by federal law even though "a State court derives its existence and functions from the State laws"); see also *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807) (Marshall, C.J.) (state courts "emanate from a different authority, and are creatures of a distinct government").

⁸ See, e.g., *Clafin*, 93 U.S. at 141 (denying "that Congress could confer jurisdiction upon the State courts"); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 27-28 (1820) (opinion of Washington, J.) ("I hold it to be perfectly clear, that Congress cannot confer jurisdiction upon any Courts, but such as exist under the constitution and laws of the United States, although the State Courts may exercise jurisdiction on cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the federal Courts."); *id.* at 67 (Story, J., dissenting) ("There is no pretence to say, that Congress can compel a State Court Martial to convene

statements deny Congress the power asserted here—i.e., to compel a state court to hear a private action that the court lacks power to hear under state law.⁹

The statements in the Court's early decisions reflected principles that were already well-established by then. Alexander Hamilton concluded in Federalist No. 82 that state courts would use their preexisting power under state law to hear cases arising under federal statutes.¹⁰ That conclusion led to the broadly accepted view that Congress

and sit in judgment on [a federal criminal] offence."); see also *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 821 (1824) (asserting that state tribunals "may be closed to any claim asserted under a law of the United States"); *Stearns v. United States*, 22 F. Cas. 1188, 1192 (C.C. D. Vt.) (Thompson, Circuit Justice) ("Congress cannot compel a state court to entertain jurisdiction in any case * * *"); *Mitchell v. Great Works Milling & Mfg. Co.*, 17 F. Cas. 496, 499 (C.C. D. Me. 1843) (Story, Circuit Justice) ("It is clear, that congress has no right to require, that the state courts shall entertain [bankruptcy] suits * * *").

⁹ These statements are not dispositive, since this Court has not squarely addressed the questions presented here. See Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 1 Brandeis L.J. — (forthcoming Apr. 1999) at n.4 (citing extensive commentary recognizing unresolved nature of state courts' obligation to hear private federal claims), draft available at <http://www.law.sc.edu/seamon.htm>.

¹⁰ The Federalist No. 82 addressed "the situation of the State courts in regard to those causes which are to be submitted to federal jurisdiction." The Federalist No. 82, at 458 (Alexander Hamilton) (Isaac Kramnick ed., 1987). At the outset, Hamilton established the general "rule" that "the State courts will retain the jurisdiction they now have." *Id.* at 459. He then asserted that this "primitive" jurisdiction would extend even to most cases arising under federal law. *Ibid.* Specifically, he believed that, "in every case in which [the state courts] were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth." *Ibid.* Hamilton emphasized that, in taking cognizance of cases arising under federal statutes, the state courts would be exercising "the judiciary power" of their own government, not that of the national government. *Ibid.*

could not compel state courts to hear cases outside their jurisdiction under state law.¹¹ Both principles reflected an "undoubted truth": "that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit." *Missouri v. Lewis*, 101 U.S. 22, 31 (1879).¹²

To be sure, this Court has described some early federal statutes as "conferr[ing] jurisdiction upon the state courts." *Testa v. Katt*, 330 U.S. 386, 389-390 (1947). Those statutes "conferred jurisdiction" only in the sense that they gave state courts enforcement authority that could have been given exclusively to federal courts. See *Clafin*, 93 U.S. at 139-140. The early statutes did not, however,

¹¹ See *Clafin*, 93 U.S. at 138 (citing Federalist No. 82); *Houston v. Moore*, 18 U.S. at 26 n.a (opinion of Washington, J.) (same); 1 *Annals Cong.* 808 (Joseph Gales ed. 1789) (statement of Rep. Fisher Ames) ("The law of the United States is a rule to them [i.e., the state courts], but no authority for them. It controlled their decisions, but could not enlarge their powers."), quoted in Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 Wis. L. Rev. 39, 152; Alexander Hamilton, *The Examination No. 6*, N.Y. Eve. Post, Jan. 2, 1802 (describing as "liable to question" and "seriously questioned" the "right to employ the agency of the State Courts for executing the law of the Union"), reprinted in 25 *The Papers of Alexander Hamilton* 484 (Harold C. Syrett ed., 1977), quoted in Collins, *supra*, 1995 Wis. L. Rev. at 137 n.283; 1 James Kent, *Commentaries on American Law* 377 (New York, O. Halstead 1826) ("The doctrine seems to be admitted, that congress cannot compel a state court to entertain jurisdiction in any case.") (footnote omitted); 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1749, at 562 (3d ed. 1858). See generally James D. Barnett, *The Delegation of Federal Jurisdiction to State Courts*, in 3 *Selected Essays on Constitutional Law: The Nation & the States* 1202, 1213 (Ass'n Am. Law Sch. ed. 1938), cited in *Testa v. Katt*, 330 U.S. 386, 390 n.5 (1947).

¹² Cf. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 221 (1916) (argument that state court should be regarded as federal court when adjudicating federal claim was "in conflict with an essential principle upon which our dual constitutional system of government rests").

unambiguously compel state courts to enforce federal law if they lacked power to do so under state law. See *Printz v. United States*, 521 U.S. 898, 906 n.1 (1997).¹³ To the extent that the statutes could be construed to exert such compulsion, their constitutionality was consistently disputed.¹⁴

Moreover, none of the early federal statutes compelled state courts to hear actions against their own State. Neither those statutes—nor anything else in this country's history, for that matter—supports the congressional power that petitioners defend here.¹⁵

¹³ See also *Holmgren v. United States*, 217 U.S. 509, 517 (1910) (state courts can enforce federal law “[u]nless prohibited by state legislation”); *United States v. Jones*, 109 U.S. 513, 520 (1883) (“And though the jurisdiction thus conferred [by early federal statutes] could not be enforced against the consent of the States, yet, when its exercise was not incompatible with State duties, and the States made no objection to it, the decisions rendered by the State tribunals were upheld.”).

¹⁴ See, e.g., Collins, note 11 *supra*, 1995 Wis. L. Rev. at 135-164; William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1094 n.237 (1983); Charles Warren, *Federal Criminal Laws & the State Courts*, 38 Harv. L. Rev. 545, 546 (1925) (asserting, in article discussing early federal statutes apparently requiring state-court enforcement, that “Congress has no power to force jurisdiction upon a State Court”).

¹⁵ See Fletcher, note 14 *supra*, 35 Stan. L. Rev. at 1095 (finding it “clear” that the framers of the Eleventh Amendment “did not contemplate” that “Congress could require state courts to hear cases barred from federal courts by the Eleventh Amendment”); James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 596 (1994) (“It seems unlikely * * * that the framers [of the original Constitution] would have chosen to compel the state courts to entertain federal claims against their will and in violation of their own jurisdictional limits.”) (footnote omitted).

B. This Court Confirmed Its Early Decisions In Later Decisions Holding That the Supremacy Clause Sometimes Compels State Courts to Adjudicate Federal Actions

In this century, the Court has held that the Supremacy Clause sometimes obligates state courts to enforce federal law. The Court has linked that obligation to the state courts' having jurisdiction to do so under neutral state law. At the same time, the Court has strongly suggested that Congress cannot enlarge the jurisdiction of state courts beyond that established by neutral state law.

In *Mondou v. New York, New Haven & Hartford R.R. Co.*, the Court held that a state court erred in refusing to enforce a federal statute because of disagreement with the policy underlying the statute. 223 U.S. 1, 55-59 (1912). The Court concluded that rights arising under federal law are enforceable in state courts “when their jurisdiction, as prescribed by local laws, is adequate to the occasion.” *Id.* at 59. Thus, the state courts' duty to enforce federal rights depends on “[t]he existence of the jurisdiction.” *Id.* at 58. The Court in *Mondou* emphasized that the case did not involve “any attempt by Congress to enlarge or regulate the jurisdiction of state courts.” *Id.* at 56.¹⁶

The Court took similar care in *Testa* to avoid implying that Congress could enlarge the jurisdiction of state courts. *Testa* held that a state court could not decline enforcement of a federal law because the law was “foreign in the international sense.” See 330 U.S. at 388 (internal quota-

¹⁶ See also *Herb v. Pitcairn*, 324 U.S. 117, 120 (1945) (quoting this passage from *Mondou*); *Bombolis*, 241 U.S. at 219 (“proceedings in state courts [under the federal statute at issue] deriv[e] their authority from state law”); *id.* at 222 (*Mondou* “in no sense implied that the duty which was declared to exist on the part of the state court depended upon the conception that for the purpose of enforcing that [federal] right, the state court was to be treated as a Federal court, deriving its authority not from the State creating it, but from the United States”).

tion marks & citation omitted). The Court in *Testa* further held that the state court had an obligation to enforce the federal law. *Id.* at 390-394. The Court traced that obligation directly to the Supremacy Clause. *Id.* at 389. As in *Mondou*, however, the Court premised that obligation on the state court's having "jurisdiction adequate and appropriate under established local law." *Id.* at 394.

Thus, the Court in *Mondou* and *Testa* held that the Supremacy Clause invalidated state laws that permitted or required state courts to discriminate against federal claims. The Court premised the state courts' duty to hear those claims, however, on their having power to do so under the state law that remained intact once the discriminatory state law was set aside. At the same time, the Court deliberately avoided suggesting that Congress could compel state courts to hear federal claims that they would not have power to hear under neutral state law. The Court thereby strongly implied that Congress lacked the power to do so. That implication accorded with direct statements to the same effect in earlier decisions (see Part I.A, *supra*).

C. *New York* and *Printz* Establish Congress's Lack of Power Under the Commerce Clause to Commandeer the State Courts

This Court reaffirmed in *New York v. United States* and *Printz v. United States* that the Supremacy Clause is the source of the state courts' obligation to enforce Article I statutes. See *Printz*, 521 U.S. at 928-929; *New York v. United States*, 505 U.S. 144, 178-179 (1992). In addition, those cases confirm that Congress cannot enlarge the state courts' obligation using the Commerce Clause. The pertinence of *New York* and *Printz* becomes clear when one considers petitioners' view of Congress's power. The congressional commandeering of state courts permitted under that view would harm the system of dual sovereignty in the same ways that led this Court in *New York* and

Printz to strike down federal statutes that commandeered the other branches of state government.

In the absence of a valid exercise of congressional power, States have broad control over their courts. In particular, the state courts can decline to hear a federal action if they have a valid excuse for doing so. See, e.g., *Howlett v. Rose*, 496 U.S. 356, 369 (1990). An excuse is valid if it relates to judicial administration and neither discriminates against nor is inconsistent with federal law. See *id.* at 371-372. Thus, in the absence of a valid federal statute, a State may neutrally control the volume and types of cases that its courts can hear. See *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 4 (1950); *Douglas v. New York, New Haven & Hartford R.R. Co.*, 279 U.S. 377, 387-388 (1929).

Petitioners contend that Congress can eliminate the States' control over their courts. They assert that a state court must "enforce a federal law when[ever] federal law requires it to do so." U.S. Br. 22; see Alden Br. 19. They also assert that Congress has unlimited power to impose such requirements under the Commerce Clause. See U.S. Br. 26-27; Alden Br. 21-22.¹⁷ In petitioners' view, therefore, Congress can compel state courts to enforce Commerce Clause enactments even if the courts lack power to do so under neutral state law.¹⁸

¹⁷ Petitioners rely heavily on *Howlett v. Rose*, 496 U.S. 356, in which a state-law limitation on state-court jurisdiction was asserted to be inconsistent with a federal statute, 42 U.S.C. § 1983, enacted under Section 5 of the Fourteenth Amendment. See U.S. Br. 21-22; Alden Br. 14, 16-22; cf. *Mitchum v. Foster*, 407 U.S. 225, 238 (1972). It is doubtful that Congress's power to compel state-court adjudication under that provision corresponds to its power to do so under the Commerce Clause. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 65-66 (1996).

¹⁸ Petitioners suggest that Congress's power extends only to "state courts of general jurisdiction." Alden Br. 7; cf. U.S. Br. 20. The logic of petitioners' argument admits of no such limitation. Petitioners evidently make the suggestion to avoid the implication

Petitioners' view cannot be reconciled with *New York* and *Printz*. Those decisions identify three harms to the system of dual sovereignty caused by congressional "commandeering" of state government. Each harm could occur if Congress could commandeer the state courts by requiring them to adjudicate federal claims despite the limits on those courts' jurisdiction established by neutral state law.

First, congressional commandeering of state courts would divert state time and resources from matters of local concern. See *FERC v. Mississippi*, 456 U.S. 742, 763 n.27 (1982); cf. *Printz*, 521 U.S. at 930; *New York*, 505 U.S. at 168. Simply put, the more time and money that Congress required state courts to devote to hearing federal cases, the less they would have for hearing state cases. Congressional commandeering of the state courts could consume just as much state energy as could congressional commandeering of the other branches of state government.

Second, congressional commandeering of state courts would interfere with the power of the State's citizens to set an agenda for state legislative action. See *FERC*, 456 U.S. at 763 n.27; cf. *id.* at 779 & 784-785 (O'Connor, J., concurring in the judgment in part and dissenting in part); *New York*, 505 U.S. at 168-169, 173-174 & 185. A state legislature often responds to local problems by enacting laws that must be enforced in state courts. The legislature cannot effectively respond in that way when the state courts are already clogged. Moreover, in that situation the legislature cannot expedite the adjudication of urgent cases in the state courts.

Finally, congressional commandeering of state courts would blur the lines of accountability between state and federal officials. Cf. *Printz*, 521 U.S. at 930; *United States v. Lopez*, 514 U.S. 549, 581-582 (1995) (Kennedy, J.,

that Congress could compel even state courts of limited jurisdiction, such as small-claims courts, to adjudicate federal actions without regard to state-law limits on their jurisdiction. Cf. *Herb*, 324 U.S. at 120-124.

concurring); *New York*, 505 U.S. at 169. A state legislature could react in two ways to the congressional commandeering of its courts. It could expand its court system, but that would take money. It could do nothing, but that would cause the quality and speed of state-court adjudication to deteriorate. Either route would cause state residents to blame members of the state legislature, rather than members of Congress, for the increase in costs or the decrease in efficiency.

New York and *Printz* make clear that Congress could not compel a state legislature to enact, and the Governor to sign, a law requiring state courts to hear federal claims. The reasoning of *New York* and *Printz* makes clear that Congress cannot achieve the same result by enacting an identical statute itself. See also *Holmgren*, 217 U.S. at 517 ("It is undoubtedly true that the right to create courts for the states does not exist in Congress.").

D. Congress Severely Undermines the Federalist System of Dual Sovereignty When It Compels State Courts to Hear Private Claims for Retroactive Monetary Relief Against Their Own, Unconsenting State

This case involves a use of the Commerce Clause that deeply harms the federalist system of dual sovereignty. Here, Congress seeks to compel a state court to hear an action for retroactive monetary relief against its own State without its consent. That use of the Commerce Clause should be rejected even if Congress can compel state courts to adjudicate other types of federal actions.

Congress is using the Commerce Clause in this case to turn the State against itself. The case pits the executive branch of Maine against its judicial branch. The executive branch has scrupulously honored its obligations under the FLSA, as that branch understands them. Petitioners argue that Section 216(b) of the FLSA compels the state judiciary to review the executive branch's understanding. If the state court's understanding differs from

that of the coequal branch, it may enter an award payable out of the state treasury. That would pit the judiciary against the third branch, the legislature, which has exclusive control over the treasury. See Me. Const. art. V, pt. 3d, § 4.

Congress cannot do this. Decisions by the people of a State allocating powers among the branches of their state government "go to the heart of representative government." *Gregory*, 501 U.S. at 461 (internal quotation marks and citation omitted); see *id.* at 460 ("Through the structure of its government * * *, a State defines itself as a sovereign."); see also *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."). That is especially true of decisions about control of the state treasury. See *Louisiana v. Jumel*, 107 U.S. 711, 727-28 (1883). Thus, Congress cannot use the Commerce Clause to empower the federal courts to tap the state treasury. See *Seminole Tribe*, 517 U.S. at 63-73. Congress should not be able to use that Clause to compel state courts to tap the state treasury.

Indeed, such a use of the Commerce Clause conflicts with *New York*. The Court there held that Congress could not compel a State that missed a federal deadline to grant a subsidy to private parties. See *New York*, 505 U.S. at 175. Similarly, Congress cannot compel a State that allegedly violated a federal payscale to make a payment from the state treasury to private parties. That conclusion is not altered by the fact that, here, Congress seeks to exert that compulsion through the state courts. That simply compounds the harm to dual sovereignty, given the state courts' lack of power to grant such payments.¹⁹

¹⁹ Although Congress cannot compel the state courts to award retroactive monetary relief against their own State, the States must comply with the substantive provisions of the FLSA, and other remedies are available for noncompliance. See Maine Br. 11-13.

II. THE SUPREMACY CLAUSE DID NOT OF ITS OWN FORCE REQUIRE THE MAINE SUPERIOR COURT TO HEAR THIS ACTION

A. The Supremacy Clause Would Not Require a State Court to Hear an FLSA Claim If State Law Barred All Private Actions Against the State in Its Own Courts

The Supremacy Clause, of its own force, invalidates state laws that discriminate against federal claims. See, e.g., *McKnett v. St. Louis & San Francisco Ry. Co.*, 292 U.S. 230, 234 (1934). The Clause also requires state courts to hear federal claims that, apart from such discriminatory state laws, they are "otherwise" competent under state law to hear. *Howlett*, 496 U.S. at 374. Besides invalidating discriminatory state-law restrictions on the power of state courts, however, the Supremacy Clause does not enlarge the jurisdiction of state courts.

Thus, a state court may, consistently with the Supremacy Clause, decline to hear federal actions on the basis of a "neutral state rule regarding the administration of the courts." *Howlett*, 496 U.S. at 372.²⁰ A state law that barred *all* claims against the State in its courts would constitute such a rule. See Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 692 n.62 (1976). Thus, the Supremacy Clause would not require a state court to entertain an FLSA action against the State if the State completely retained immunity in its courts.

Petitioners concede as much. The federal petitioner says: "When a state court's basis for refusing to entertain a federal monetary claim is a sovereign immunity

²⁰ Those rules may be preempted by a valid federal law. *Howlett*, 496 U.S. at 372; see, e.g., *Felder v. Casey*, 487 U.S. 131, 138-153 (1988). We showed in Part I, however, that no preemption occurred here.

defense, the relevant question—for the specific purpose of assessing the issue of discrimination—is whether the state court entertains state-law monetary claims against the State in which the State does not recognize sovereign immunity as a defense.” U.S. Br. 25. The inescapable implication is that, if the answer to the “relevant question” is no—*i.e.*, if the state court does not entertain *any* state-law, monetary claim against the State—then the State’s assertion of the sovereign immunity defense to a federal monetary claim does not violate the Supremacy Clause’s nondiscrimination principle. The same implication flows from the private petitioners’ argument on the discrimination issue. See Alden Br. 32-37.

It thus appears to be common ground that the judgment below would have to be affirmed if Maine had wholly preserved its immunity from suit in its courts. In that event, the Supremacy Clause would not invalidate the state law of immunity. That law would remain intact and prevent state courts from being competent to hear any claims against the State, including federal claims based on Commerce Clause enactments.

B. The Supremacy Clause Does Not Require a State Court to Hear a Federal Claim Unless State Law Would Empower the Court to Hear A State-Law Claim Arising From the Same Facts

Maine has not wholly retained immunity in its courts; it has consented to suits on certain private claims. See Pet. App. 6a. That consent did not trigger a Supremacy Clause obligation by its courts to hear actions for overtime compensation under the FLSA. The Supremacy Clause only obligates a state court to apply federal law to a dispute that the court has power to hear under state law. The Clause therefore does not require a state court to hear a federal claim if the court lacks power to decide a state-law claim arising from the same facts.

This is clear from this Court’s precedent in an analogous setting. The precedent concerns actions in federal court

to which the State has consented. The precedent establishes that a State cannot restrict its consent so as to prevent a federal court from applying relevant federal law. Such a restriction would require the federal court to violate the Supremacy Clause. The precedent also establishes, however, that a State’s consent cannot be enlarged beyond that necessary for a federal court to comply with the Supremacy Clause.

The leading case is *Gardner v. New Jersey*, 329 U.S. 565 (1947). See also *Wisconsin Dep’t of Corrections v. Schacht*, 118 S. Ct. 2047, 2056 (1998) (Kennedy, J., concurring) (citing *Gardner* with approval). In *Gardner*, the State filed a claim against the bankruptcy estate in a federal reorganization proceeding. See *id.* at 570. The State argued that the Eleventh Amendment barred the federal court from considering objections to the State’s claim. See *id.* at 571. This Court rejected that argument. *Id.* at 573-575. The Court held that, “[w]hen the State becomes the actor and files a claim * * * it waives any immunity which it otherwise might have had respecting the adjudication of the claim.” *Id.* at 574.²¹

The Court has made clear, however, that a sovereign’s waiver does not extend beyond matters “respecting the adjudication of the [sovereign’s] claim.” *Id.* The defendant to the claim “may, without statutory authority, recoup on a counterclaim an amount equal to the principal claim.” *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 511 (1940); see also 3 *Moore’s Federal Practice* § 13.50[4], at 13-69 (3d ed. 1998). The

²¹ A State’s voluntary submission of an affirmative claim to a federal court differs greatly from conduct that the Court has held insufficient to constitute a waiver of sovereign immunity. See *Schacht*, 118 S. Ct. at 2056-2057 (Kennedy, J., concurring); see also, *e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). *Gardner* therefore does not support a doctrine of “constructive waiver,” and other precedent of this Court has cast serious doubt on, if not invalidated, that doctrine, see *Chavez v. Arte Publico Press*, 157 F.3d 282, 285-287 (5th Cir. 1998), *reh’g en banc granted* (Oct. 1, 1998).

defendant can assert such a counterclaim, however, only to reduce or eliminate affirmative recovery by the sovereign. See, e.g., *Livera v First Nat'l State Bank*, 879 F.2d 1186, 1195 (3d Cir.), *cert. denied*, 493 U.S. 937 (1989). Furthermore, the defendant's counterclaim must arise out of the same facts as the sovereign's claim. See, e.g., *ibid.*; accord, e.g., *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1148-1150 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1517 (1998); *Commonwealth v. Matlack*, 4 U.S. (4 Dall.) 303 (Pa. 1804).

The recoupment doctrine honors a sovereign's immunity while ensuring that federal courts honor the Supremacy Clause. A State may waive its immunity by submitting a claim to a federal court. The State cannot, however, limit that waiver so as to prevent the court from following federal law applicable to the claim. Such a limitation would require the court to violate the Supremacy Clause by disregarding federal law. No such violation occurs, however, when a federal court declines to hear counterclaims against the State that do not arise out of the same facts as does the State's claim. The court's refusal to hear such counterclaims respects sovereign immunity to the extent permitted by the Supremacy Clause.

The same reasoning applies when a State waives its immunity, not by filing a claim in federal court, but by consenting to claims against it in its own courts. The State cannot limit its consent so as to prevent its courts from applying relevant federal law in resolving the claims. The State can, however, refuse to consent to claims that do not arise out of the same facts as do the claims to which it has consented. The State's withholding of such consent does not require the state courts to violate the Supremacy Clause.

Suppose, for example, that a State authorized a discharged employee to sue it on the ground that her discharge violated the employment contract. The State could not prevent the employee from arguing that her discharge

also violated a valid federal statute. That restriction would require the state court to disregard federal law governing the dispute over the discharge. Such disregard would violate the Supremacy Clause.

No similar violation would occur if the State consented to suits for wrongful discharge but not to suits for unrelated claims arising during the term of employment. The Supremacy Clause is offended only when the State allows its courts to hear a state-law claim, but prohibits them from hearing a federal claim arising from the same facts. It is only in that situation that the State's restriction on its consent to suit would require the courts to violate the Supremacy Clause.

C. The Supremacy Clause Did Not Require the Superior Court of Maine to Hear Petitioners' FLSA Claims, Because State Law Did Not Empower the Court to Hear a State-Law Claim Arising From the Same Facts As Do Petitioners' Claims

Although Maine has waived immunity from certain actions in its courts, it has not waived its immunity from actions for overtime. See Pet. App. 6a. Maine has done more than simply refrain from creating a cause of action for overtime from the State. See Me. Rev. Stat. Ann. tit. 26, § 664.3.D. It has barred its courts from entertaining such actions whether they arise under federal or state law.²² Because Maine did not empower the Superior Court of Maine to hear a state-law claim arising from the facts underlying petitioners' claims, that court was not obligated to hear those claims by the Supremacy Clause.

²² See, e.g., *Davies v. City of Bath*, 364 A.2d 1269, 1270 (Me. 1976) (state courts lack power to impose monetary liability in action barred by sovereign immunity); *Bale v. Ryder*, 286 A.2d 344, 348 (Me. 1972) (same); see also *Drake v. Smith*, 390 A.2d 541, 544 (Me. 1978) (court lacked power to issue declaratory relief that would serve no purpose other than to establish liability of immune entity).

The private petitioners contend that the state court did have such an obligation because it entertains state-law claims that are "analogous" to petitioners' claims. Alden Br. 32; see also U.S. Br. 25. That contention rests on an unworkable standard. At a high enough level of generality, every claim is analogous to every other one, and the private petitioners offer no guidance for determining the appropriate level of generality.

The federal petitioner does propose a standard: It argues that all private, monetary claims against a State should be regarded as analogous. U.S. Br. 20, 25. In its view, therefore, if a State waives its immunity from any private monetary claims, it exposes itself to all federal monetary claims. The federal petitioner offers no legal support for that standard. In any event, it should be rejected, for it would give States a strong incentive not to waive their immunity at all.

More fundamentally, both petitioners' theories conflict with this Court's precedent. The precedent establishes that the Supremacy Clause does not add to the jurisdiction of state courts except by invalidating discriminatory restrictions on their jurisdiction. See Part II.A, *supra*. Thus, for example, the Clause does not compel a state court to hear a federal claim that is barred by the state law doctrine of *forum non conveniens* or that falls outside the court's territorial jurisdiction, regardless of how closely analogous the claim might be to claims that fall within the state court's jurisdiction. See *Mayfield*, 340 U.S. at 4; *Herb*, 324 U.S. at 120-124; cf. *McKnett*, 292 U.S. at 231-234. However analogous a federal claim might be to a state-law claim that falls within a state court's jurisdiction, the Supremacy Clause does not require the state court to hear the federal claim if the court lacks power to do so under neutral state law, including the law of sovereign immunity.²³

²³ This conclusion is supported by *Georgia R.R. & Banking Co. v. Musgrove*, 335 U.S. 900 (1949) (per curiam), cited in *Howlett*, 496

Petitioners' contrary position finds no support in *Testa*. The Court in *Testa* observed that Rhode Island courts heard state claims of the "same type" as the federal claim at issue. 330 U.S. at 394; see also *Howlett*, 496 U.S. at 375. The Court made that observation, however, to show that the state courts had "jurisdiction * * * under established local law to adjudicate" the federal claim. *Testa*, 330 U.S. at 394; see also *Howlett*, 496 U.S. at 378-379.²⁴ Nothing in *Testa* suggests that a state court must entertain a federal claim that is merely analogous to claims over which the court has jurisdiction under state law, even though the federal claim falls outside the court's jurisdiction as established by neutral state law.

Such a suggestion, moreover, would have dramatically departed from precedent. See Part I.A & I.B, *supra*. Yet the unanimous decision in *Testa* does not signal any intention to do so. To the contrary, "the sense of the *Testa* opinion was that it merely reflected longstanding

U.S. at 372. In *Musgrove*, this Court dismissed an appeal from a judgment of the Georgia Supreme Court, holding that that judgment was "based upon a non-federal ground adequate to support it." 335 U.S. at 900. The judgment below had relied on the state law of sovereign immunity to affirm the dismissal of a state-court action against a state official alleging a violation of the U.S. Constitution. See *Musgrove v. Georgia R.R. & Banking Co.*, 204 Ga. 139, 156-160 (1948), *appeal dismissed*, 335 U.S. 900 (1949). This Court's holding in *Musgrove* establishes that federal law does not require a state court to hear a federal claim that would have been barred by the Eleventh Amendment had the claim been brought in federal court. As such, *Musgrove* accords with other precedent of this Court. See generally Seamon, *supra* note 9.

²⁴ The "local law" cited in *Testa* (330 U.S. at 394 n.13): (1) gave the state district courts jurisdiction over "all civil actions * * * wherein the debt or damages * * * do not exceed \$1,000.00" (R.I. Gen. Laws, ch. 500, § 28 (1938)); (2) gave the state superior court jurisdiction to review the district court's decisions in such cases (*id.*, ch. 525, § 7); and (3) divided between those two courts jurisdiction over actions to recover "fines, penalties, and forfeitures" (*id.*, ch. 631, § 4).

constitutional decision and policy." *Palmore v. United States*, 411 U.S. 389, 402 (1973).

* * *

Neither the FLSA, as buttressed by the Supremacy Clause, nor the Supremacy Clause, of its own force, compelled the Superior Court of Maine to hear this action.

CONCLUSION

The judgment of the Maine Supreme Judicial Court should be affirmed.

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